21-249

Submitted Dec. 11. 1874.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 486.

GEORGE M. OCHILTREE, PLAINTIFF IN ERROR,

vs.

THE IOWA RAILROAD CONTRACTING COMPANY, STOCKHOLDERS IN MISSOURI, IOWA AND NEBRASKA RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED SEPTEMBER 9, 1874.

Oct. 1874

UNITED STATES COURT OF CLAIMS.

No. 486.

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THE IOWA RAILROAD CONTRACTING COMPANY, STOCKHOLDERS IN MISSOURI, IOWA AND NEBRASKA RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 STATE OF MISSOURI, *ss:*

Be it remembered that heretofore, to wit, on the twenty-ninth day of September, in the year of our Lord one thousand eight hundred and seventy-three, there was filed in the office of the clerk of the supreme court, held at St. Louis, of the State of Missouri, a transcript of the record and proceedings of the Clark circuit court in a certain cause lately therein pending, which transcript is in the words and figures following, to wit:

TRANSCRIPT FROM THE RECORDS OF THE CIRCUIT COURT OF CLARK COUNTY, IN THE STATE OF MISSOURI.

STATE OF MISSOURI, *County of Clark, ss:*

Be it remembered that on the 19th day of May, 1873, it being the first day of the May term of the circuit court of said county of Clark for the year 1873, the said court being then in session—present, the honorable E. V. Wilson, judge of said court; Samuel Spangler, clerk thereof, and S. F. Sackett, sheriff of said county of Clark—the following, among other proceedings, were had in said court, to wit:

2 GEORGE M. OCHILTREE, PLTF.,
v.
THE IOWA RAILROAD CONTRACTING COMPANY, deft.

Now comes plaintiff, by attorney, and files motion for an execution against defendant herein.

Which said motion is in words and figures as follows, to wit:

Motion for execution.

In the circuit court of Clark County, Missouri, May term, 1873.

GEORGE M. OCHILTREE, PLAINTIFF,
vs.
IOWA RAILROAD CONTRACTING COMPANY, stockholders in Missouri, Iowa and Nebraska Railway Company, defendant.

The plaintiff states that on the 24th day of January, 1873, he recovered judgment in the circuit court of Clark County, Missouri, aforesaid, against the Missouri, Iowa and Nebraska Railway Company, a corporation existing under the laws of this State, for the sum of four thousand one hundred and nineteen $\frac{25}{100}$ dollars and ninety-six $\frac{15}{100}$ dollars costs, the said judgment drawing interest at the rate of six per cent. per annum from date; that said judgment was rendered for claim for services and money advanced by said plaintiff, and for services rendered by Samuel M. Young and E. Pratt Buell to the Alexandria
3 and Nebraska City Railroad Company, a corporation formerly existing under the laws of this State; that said claims of Young and Buell were for value assigned to plaintiff; that said claims all accrued during the year beginning April, 1869, and ending April, 1870; that on the day of May, 1870, the said company and the Iowa Southern Railway Company, a corporation then existing under the laws of the State of Iowa, were, pursuant to the laws of this State and of Iowa,

duly consolidated, by resolution of the board of directors of each of said companies, into one corporation, under the corporate name and style of said Missouri, Iowa and Nebraska Railway Company; that the claims aforesaid, at the date of consolidation, were due and owing to plaintiff, and that by said consolidation the Missouri, Iowa and Nebraska Railway Company became liable therefor under the law of this State, and also by express provision made in said articles of consolidation; that at the time said debts were contracted by the said Alexandria and Nebraska City Railroad Company, the stockholders of said company, at the time of issuing execution or return of same nulla bona, were liable to an extent equal in amount to the amount of stock by them owned, together with any amount unpaid thereon; that at the time of consolidation aforesaid, when the said Missouri, Iowa and Nebraska
4 Railway Company became liable for said debts to the stockholders of said company at time of issuing execution or return of same nulla bona, were liable to an extent equal in amount to the amount of stock by them owned, together with any amount unpaid thereon; that the law of liability of stockholders as aforesaid entered into and became a part of the contract of indebtedness aforesaid; that plaintiff, since obtaining judgment as aforesaid against said company, has caused execution to be issued from this court on same, which execution has been returned nulla bona and unsatisfied; that the said Iowa Railroad Contracting Company is now, and was at the time of issuing of execution aforesaid, a stockholder in said Missouri, Iowa and Nebraska Railway Company; that said Iowa Railroad Contracting Company, a corporation existing under the laws of Iowa, owns eight thousand nine hundred and sixty shares in said Missouri, Iowa and Nebraska Railway Company, each share being for one hundred dollars.

Wherefore plaintiff prays that an execution may issue on said judgment against said Iowa Railroad Contracting Company for enough to satisfy said judgment, interest, and costs.

JAMES HAGERMAN,
Attorney for Pltf., Geo. M. Ochiltree.

5 Annexed to which said motion is a notice, which is in words and figures as follows, to wit:

Notice.

To the Iowa Railroad Contracting Company:

You are hereby notified that a motion, a true copy of which is hereto annexed and made part hereof, will be presented to the hon. circuit of Clark County, Missouri, at its May term, 1873, at the hour of nine o'clock on the morning of May 20th, 1873, or so soon thereafter as the same may be heard by said court, praying an order for execution against you, as stockholders in the Missouri, Iowa and Nebraska Railway Company, on a judgment against said company in favor of George M. Ochiltree.

JAMES HAGERMAN,
Attorney for Geo. M. Ochiltree, Plaintiff.

Upon which notice is an endorsement in words and figures as follows, to wit:

Service of notice.

STATE OF MISSOURI, *County of Clark, ss:*

I, Ben. E. Turner, on oath state that I served within notice and petition on the Iowa Railroad Contracting Company by delivering a true copy of said notice and petition to Henry Hill, the general
6 superintendent and managing officer of said company in this State, at its office of business in the city of Warsaw, in the county of Hancock, in the State of Illinois.

B. E. TURNER.

Subscribed and sworn to by B. E. Turner before me this May 19th, 1873.

SAMUEL SPANGLER, *Clerk.*

Afterwards, to wit, on the 28th day of May, 1873, there was filed in said c. court an answer to the plaintiff's petition herein, which is in words and figures as follows, to wit:

Answer.

In circuit court, Clark County, May term, A. D. 1873.

GEORGE M. OCHILTREE, PLAINTIFF,
vs.
IOWA RAILROAD CONTRACTING COMPANY, stockholders in the Missouri, Iowa and Nebraska Railway Company, a corporation, defendant. } Motion for execution.

Now comes defendant, and for cause why execution should not issue against her as stockholder in said railway company, as prayed for in plaintiff's motion, says: As to whether the judgment as stated in plaintiff's motion was rendered for claim for services and money advanced by plaintiffs and for services rendered by Samuel M. Young and E. Pratt Buell to the Alexandria and Nebraska City Railway Company, a
7 corporation formerly existing under the laws of this State, and as to whether the claims of said Young and Buell were assigned to plaintiff for value, and as to whether all said claims accrued during the year beginning April, 1869, and ending April, 1870, this defendant has no knowledge or information sufficient to form a belief, and asks for proof.

Deny that at the time the said debts were contracted by said Alexandria and Nebraska City Railway Company the stockholders of said company, at the time of issuing of execution or return of nulla bona, were liable to an extent equal in amount to the amount of stock by them owned, together with any amount unpaid thereon.

Deny that at the time of the consolidation, as stated in plaintiff's motion, the Missouri, Iowa and Nebraska Railway Company became liable for said debts, the stockholders at the time of issuing execution or return of same nulla bona were liable to an extent equal in amount to the amount of stock by them owned, together with any amount unpaid thereon. Deny that the law of liability of stockholders entered into and became a part of the contract of indebtedness aforesaid.

Admit that execution has issued, and been returned nulla bona, against the Missouri, Iowa and Nebraska Railway Company, as stated

in plaintiff's motion. Admit that defendant is now, and was at the
8 date of issuing said execution, the owner of shares of said railway stock, as stated in plaintiff's motion, and that each share is one hundred dollars.

Defendant states the facts to be that at the time said debts accrued she was not, nor is she now, the owner of any of the stock of said Alexandria and Nebraska City Railroad Company, nor the owner of any stock issued by the Missouri, Iowa and Nebraska Railway Company in lieu of any stock surrendered by said Alexandria and Nebraska City Railway Company, and that no stock, as last or before described, appears upon any books of either the Alexandria and Nebraska City Railway Company, nor upon the books of the said Missouri, Iowa and Nebraska Railway Company.

Defendant says that all stock now owned by her has been issued and subscribed for since the amendment to section six, article eight, of the constitution of the State of Missouri, adopted November, 1870, and by said amendment she is not liable, as set forth in plaintiff's motion.

Defendant further says that by an act of the general assembly, approved February 9th, 1857, the Alexandria and Bloomfield Railroad Company was incorporated, and by an amendment thereto, approved
, 1866, the corporate name was changed to that of the Alex-
9 andria and Nebraska City Railway Company, and that by articles of consolidation with the Iowa Southern Railway Company, a corporation existing under the laws of Iowa, on the day of May, 1870, the said Missouri, Iowa and Nebraska Railway Company became and was incorporated, with all the rights, privileges, and immunities belonging to the said Alexandria and Bloomfield Railroad Company, and that by section 12 of said act incorporating said Alexandria and Bloomfield Railroad Company the stockholders of said company were exempted from all personal liability on account of debts contracted and created. And this defendant says that said act entered into and formed a part of the contract of said railroad company with the State of Missouri, and pleads said act in bar of any recovery upon plaintiff's motion.

This defendant, having fully answered, asks to be discharged with her costs.

McKEE & GIVENS, AND HUGHES,
For Defendant.

At the May term, 1873, of the Clark circuit court, this cause was continued by general order.

Afterwards, to wit, at the August term, 1873, of the Clark circuit court, and on the 21st day of said month, the following, among
10 other proceedings, were had, to wit:

Judgment.

GEORGE M. OCHILTREE, PLAINTIFF,
vs.
THE IOWA RAILROAD CONTRACTING COMPANY, stockholder in the Missouri, Iowa and Nebraska Railway Company, defendant. } Motion for execution.

Now, at this day, comes the said parties by their respective attorneys; and, this cause coming on to be heard, is by the said parties submitted to the court, upon the motion of the plaintiff for execution, the

answer of defendant thereto, and a statement of facts, which the said parties say to the court they have mutually agreed are true. And the court having seen and heard the said motion, answer, and agreed statement of facts, and having heard the arguments of counsel for the plaintiff and the defendant, and duly considered thereof, doth overrule said motion. Thereupon it is considered and adjudged by the court that the defendant do have and recover of and from the plaintiff herein her costs and charges in and about this cause expended, and that she may have execution therefor; to which action of the court the plaintiff at the time excepted.

11 Afterwards, to wit, at the August term, 1873, of the Clark circuit court, and on the 21st day of said month, the following, among other proceedings, were had, to wit:

GEORGE M. OCHILTREE, PLAINTIFF,
vs.
THE IOWA RAILROAD CONTRACTING COMPANY, stockholder in the Missouri, Iowa, and Nebraska Railway Company, defendant.

Now, at this day, comes the plaintiff by his attorney, and files his motion for a rehearing herein; which having been seen and duly considered by the court, the same is overruled; to which action of the court the plaintiff at the time excepted.

Which said motion for a rehearing is in the words and figures as follows, to wit:

Motion for rehearing.

In the circuit court of Clark County, Missouri, August term, 1873.

G. M. OCHILTREE, PLAINTIFF,
vs.
THE IOWA RAILROAD CONTRACTING COMPANY, stockholder in the Missouri, Iowa and Nebraska Railway Company, defendant.

The plaintiff moves the court for a new trial or rehearing of the motion for execution against the defendant: First, because the find-
12 ing of court was against the law; second, because the court erred in not declaring the law to be as asked in plaintiff's declarations numbered 2, 3, 4, respectively; third, because finding of court was for wrong party.

JAMES HAGERMAN,
JOHN C. ANDERSON,
PARK HENSHAW,
Attys. for Plaintiff.

Afterwards, to wit, at the August term, 1873, of the Clark circuit court, and on the 21st day of said month, the following, among other proceedings, were had, to wit:

GEORGE M. OCHILTREE, PLAINTIFF,
vs.
THE IOWA RAILROAD CONTRACTING COMPANY, stockholder in the Missouri, Iowa and Nebraska Railway Company, defendant.

And now comes the plaintiff and files his bill of exceptions herein;

which, having been seen and examined by the court, is by the judge thereof signed and sealed and ordered to be made a part of the record in this cause.

Which said bill of exceptions is in words and figures as follows, to wit:

13 *Bill of exceptions.*

In the circuit court, Clark County, Missouri, August term, 1873.

GEORGE M. OCHILTREE, PLFT.,
vs.
THE IOWA RAILROAD CONTRACTING COMPANY, deft.

Be it remembered that on this day the above-entitled cause comes on to be heard on the motion of the plaintiff for execution, against defendant herein, and the answer thereto of defendant, and an agreed statement of facts by the parties herein filed in words and figures as follows, to wit:

Agreed statement of facts.

GEORGE M. OCHILTREE, PLAINTIFF,
vs.
THE IOWA RAILROAD CONTRACTING COMPANY, stockholder in the Missouri, Iowa and Nebraska Railway Company, defendants.

Motion for execution.

Now come the parties, plaintiff and defendant, by their attorneys, and, for the purposes of this suit, file this their agreed statement of facts:

1st. Admit that the debts were valid debts, contracted by the Alexandria and Nebraska City Railroad Company between May 1st, 1869, and May 1st, 1870, and that judgment was rendered thereon against Missouri, Iowa and Nebraska Railway Company, on January 24, 1873, for $4,119.25; that execution was issued and returned nulla bona, as charged in plaintiff's motion.

14 2nd. Admit the consolidation of Alexandria and Nebraska City Railroad Company, May 2nd, 1870, with Iowa Southern Railway Company, forming Missouri, Iowa and Nebraska Railway Company, and that said Missouri, Iowa and Nebraska Railway Company became obligated to pay the debts of the Alexandria and Nebraska City Railway Company. Admit that debts of plaintiff were due and owing by the Alexandria and Nebraska Railway Company at the date of said consolidation.

4th. Admit that at time debts accrued defendant was the owner of no stock in said Alexandria and Nebraska City Railway Company; that he was the owner of no stock at the date of consolidation of said companies in either company; that the stock defendant now holds is stock originally subscribed for and paid up in full since the amendment to the eighth article, section six, of the constitution of the State of Missouri, which amendment was adopted November, 1870, being stock subscribed to the original capital stock of said Missouri, Iowa and Nebraska Railway Company, and issued by said company since said constitutional amendment of 1870.

5th. Admit the stock in question is not the proceeds of any of the

stock of either the Alexandria and Nebraska City Railway Company or the Missouri, Iowa and Nebraska issued prior to the said amendment to the said constitution; that it is not stock received in lieu of, or on account of, any stock surrendered or held by any stockholders in Alexandria and Nebraska Railway Company, or by any stockholders in Missouri, Iowa and Nebraska Railway Company, prior to the adoption of said constitutional amendment.

6th. Admit that the defendant owned the shares of stock at the time execution was issued in this cause, and at the time same was returned nulla bona, and still owns same, as alleged in the plaintiff's motion.

JAMES HAGERMAN,
Attorney for Plaintiff.
F. T. HUGHES, *Atty. for Deft.*

And the same having been submitted to the court, and the court having heard arguments of counsel thereon, the plaintiff asks the following declarations of law, to wit:

SECOND DECLARATION OF LAW.

That the construction of the constitution and statute aforesaid is that the stockholders in all corporations existing at the time of the return of an execution unsatisfied against the company on a debt contracted after July 4th, 1865, and before constitutional amendment of 1870, were subject to the double-liability clause, without reference to the time when they became stockholders.

THIRD.

That the law in force at the time plaintiff contracted his debt with Alexandria and Nebraska City Railway Company, and when the Missouri, Iowa and Nebraska Railway Company became obligated to pay the said debt of plaintiff, and which regulated the liability of stockholders, entered into and became a part of the contract of indebtedness between plaintiff and said companies, and the constitutional amendment of 1870 could not alter the liability of stockholders without impairing the obligation of a contract within the meaning of section 10 of article 1 of the Constitution of the United States.

FOURTH.

The contract between the plaintiff and the company was that the stockholders in the company at the time of return of execution nulla bona, without reference to when they may have subscribed to stock, should be liable, and nothing could alter that contract without impairing its obligation.

FIFTH.

The fact that defendant subscribed to the stock of said Missouri, Iowa and Nebraska Railway Company after the constitutional amendment of 1870 cannot relieve him from double liability for debts contracted after July 4, 1865, and before the amendment of 1870, because he became a subscriber knowing, in contemplation of law, of the contract with plaintiff, and he voluntarily put himself in a position where plaintiff could call on him to respond as a stockholder of the company existing at the time of return of execution.

which, having been seen and examined by the court, is by the judge thereof signed and sealed and ordered to be made a part of the record in this cause.

Which said bill of exceptions is in words and figures as follows, to wit:

13 *Bill of exceptions.*

In the circuit court, Clark County, Missouri, August term, 1873.

GEORGE M. OCHILTREE, PLFT.,
vs.
THE IOWA RAILROAD CONTRACTING COMPANY, deft.

Be it remembered that on this day the above-entitled cause comes on to be heard on the motion of the plaintiff for execution, against defendant herein, and the answer thereto of defendant, and an agreed statement of facts by the parties herein filed in words and figures as follows, to wit:

Agreed statement of facts.

GEORGE M. OCHILTREE, PLAINTIFF,
vs.
THE IOWA RAILROAD CONTRACTING COMPANY, stockholder in the Missouri, Iowa and Nebraska Railway Company, defendants.

Motion for execution.

Now come the parties, plaintiff and defendant, by their attorneys, and, for the purposes of this suit, file this their agreed statement of facts:

1st. Admit that the debts were valid debts, contracted by the Alexandria and Nebraska City Railroad Company between May 1st, 1869, and May 1st, 1870, and that judgment was rendered thereon against Missouri, Iowa and Nebraska Railway Company, on January 24, 1873, for $4,119.25; that execution was issued and returned nulla bona, as charged in plaintiff's motion.

14 2nd. Admit the consolidation of Alexandria and Nebraska City Railroad Company, May 2nd, 1870, with Iowa Southern Railway Company, forming Missouri, Iowa and Nebraska Railway Company, and that said Missouri, Iowa and Nebraska Railway Company became obligated to pay the debts of the Alexandria and Nebraska City Railway Company. Admit that debts of plaintiff were due and owing by the Alexandria and Nebraska Railway Company at the date of said consolidation.

4th. Admit that at time debts accrued defendant was the owner of no stock in said Alexandria and Nebraska City Railway Company; that he was the owner of no stock at the date of consolidation of said companies in either company; that the stock defendant now holds is stock originally subscribed for and paid up in full since the amendment to the eighth article, section six, of the constitution of the State of Missouri, which amendment was adopted November, 1870, being stock subscribed to the original capital stock of said Missouri, Iowa and Nebraska Railway Company, and issued by said company since said constitutional amendment of 1870.

5th. Admit the stock in question is not the proceeds of any of the

stock of either the Alexandria and Nebraska City Railway Company or the Missouri, Iowa and Nebraska issued prior to the said amendment to the said constitution; that it is not stock received in lieu of, or on account of, any stock surrendered or held by any stockholders in Alexandria and Nebraska Railway Company, or by any stockholders in Missouri, Iowa and Nebraska Railway Company, prior to the adoption of said constitutional amendment.

6th. Admit that the defendant owned the shares of stock at the time execution was issued in this cause, and at the time same was returned nulla bona, and still owns same, as alleged in the plaintiff's motion.

JAMES HAGERMAN,
Attorney for Plaintiff.
F. T. HUGHES, *Atty. for Deft.*

And the same having been submitted to the court, and the court having heard arguments of counsel thereon, the plaintiff asks the following declarations of law, to wit:

SECOND DECLARATION OF LAW.

That the construction of the constitution and statute aforesaid is that the stockholders in all corporations existing at the time of the return of an execution unsatisfied against the company on a debt contracted after July 4th, 1865, and before constitutional amendment of 1870, were subject to the double-liability clause, without reference to the time when they became stockholders.

THIRD.

That the law in force at the time plaintiff contracted his debt with Alexandria and Nebraska City Railway Company, and when the Missouri, Iowa and Nebraska Railway Company became obligated to pay the said debt of plaintiff, and which regulated the liability of stockholders, entered into and became a part of the contract of indebtedness between plaintiff and said companies, and the constitutional amendment of 1870 could not alter the liability of stockholders without impairing the obligation of a contract within the meaning of section 10 of article 1 of the Constitution of the United States.

FOURTH.

The contract between the plaintiff and the company was that the stockholders in the company at the time of return of execution nulla bona, without reference to when they may have subscribed to stock, should be liable, and nothing could alter that contract without impairing its obligation.

FIFTH.

The fact that defendant subscribed to the stock of said Missouri, Iowa and Nebraska Railway Company after the constitutional amendment of 1870 cannot relieve him from double liability for debts contracted after July 4, 1865, and before the amendment of 1870, because he became a subscriber knowing, in contemplation of law, of the contract with plaintiff, and he voluntarily put himself in a position where plaintiff could call on him to respond as a stockholder of the company existing at the time of return of execution.

17 The defendant enjoying the benefits of said company equally with other stockholders, he is subject to the same liability. The law under which this debt was contracted nowhere requires the plaintiff to look to any stockholders other than those existing at time of return of execution nulla bona, and it is not for him to enquire when they become stockholders.

And the court having considered the same, refuses to give them; to which action of the court plaintiff at the time excepted. And thereupon the court overruled motion of plaintiff; to which action of the court in overruling said motion plaintiff at the time excepted. And thereupon the plaintiff filed a motion for a new trial or rehearing, in words and figures as follows, to wit:

Motion for rehearing.

In the circuit court of Clark County, Missouri, August term, 1873.

G. M. OCHILTREE, PLAINTIFF,
vs.
THE IOWA RAILROAD CONTRACTING COMPANY, stockholder in the Missouri, Iowa and Nebraska Railway Company, defendant.

The plaintiff moves the court for a new trial or rehearing of the motion for execution against the defendant—

18 First. Because the finding of court was against the law.

Second. Because the court erred in not declaring the law to be as asked in plantiff's declarations numbered 2, 3, 4, respectively.

Third. Because finding of court was for wrong party.

JAMES HAGERMAN,
JOHN C. ANDERSON,
PARK HENSHAW,
Attys. for Plaintiff.

And the court having considered the same, overruled the motion for new trial or rehearing; to which action of the court the plaintiff at the time excepted.

And now comes the plaintiff, and presents this his bill of exceptions to the court to be signed and sealed, that the action of this court may in the Supreme Court be reviewed; which is accordingly done.

E. V. WILSON, *Judge.* [SEAL.]

STATE OF MISSOURI, *County of Clark, ss:*

I, Samuel Spangler, clerk of the circuit court within and for said county, do hereby certify that the above and foregoing pages contain a full, true, and complete transcript of the record and proceedings

19 had in this court in relation to the cause entitled George M. Ochiltree against the Iowa Railroad Contracting Company, stockholder in the Missouri, Iowa and Nebraska Railway Company, as the same remains of record and on file in my said office.

In witness whereof I hereto set my hand and affix the seal of said court, at office, at Kahoka, this 5th day of August, A. D. 1873.

[SEAL.] SAMUEL SPANGLER, *Clerk.*

Proceedings in supreme court of Missouri.

And afterwards, to wit, at the October term, A. D. 1873, of the supreme court of the State of Missouri, the following proceedings were had in said cause, to wit:

MONDAY, *October* 20, 1873.

GEORGE M. OCHILTREE, PLAINTIFF IN ERROR,
vs.
THE IOW' R. R. CONTRACTING CO., DEFT. IN ERROR.

Assignment of errors filed.

Which asignment of errors is in the words and figures following, to wit:

20 *Assignment of errors.*

In the supreme court of Missouri, October term, 1873.

GEORGE M. OCHILTREE, PLAINTIFF IN ERROR,
vs.
THE IOWA RAILROAD CONTRACTING COMPANY, stockholders in Missouri, Iowa and Nebraska Railway Company, defendant in error.

The plaintiff in error now comes and assigns following errors:

First. The circuit court erred in overruling the motion of plaintiff.

Second. That the court erred in refusing to declare the law to be as asked by the plaintiff in his instructions numbered 2, 3, 4, and 5.

Third. The court erred in not holding that the constitutional amendment of 1870, section 6, article 8, of constitution of this State, was null and void as to the rights of plaintiff in this case, because, in depriving plaintiff of his remedy against stockholders under the law in force when his debts were contracted and the consolidated company became liable therefor, the said amendment impaired the obligation of plaintiff's contract within the meaning of section , art. 1, Constitution of the United States.

Fourth. The court erred in not sustaining plaintiff's motion,
21 and in not ordering an execution against the defendant under section 11, chapter 62, G. S. 1865, being section 13, 1st Wagner, 291, (edition of 1872.)

JAMES HAGERMAN,
Atty. for Pltf. in Error.

Joinder in error, &c.

And now comes the defendant, The Iowa Railroad Contracting Company, a corporation, by its attorneys, and for joinder in error says there is no error in the record and proceedings of circuit court in said cause, as assigned by said plaintiff.

F. T. HUGHES AND
BLAND & BAKER,
Attys. for Deft.

And afterwards, at the same term of same court, the following further proceedings were had in said cause, to wit:

TUESDAY, *October* 21, 1873.

GEORGE M. OCHILTREE, PLTF. IN ERROR,
vs.
THE IOWA R. R. CONTRACTING CO., DEFT. IN error.

Now come the parties aforesaid, by their attorneys, and after argument herein submit this cause to the court. Statement and brief of plaintiff in error and additional agreement of parties filed.

22 Which said additional agreement is in the words and figures following, to wit:

Additional agreement of parties.

In the supreme court of the State of Missouri, Oct. term, A. D. 1873.

GEORGE M. OCHILTREE, PLTF.,
vs.
THE IOWA RAILROAD CONTRACTING CO., A stockholder in the Missouri, Iowa & Nebraska Railroad Co., deft. } Motion for execution.

The plaintiff and defendant being mutually desirous of having their rights and responsibilities fully settled and determined, do, for the purpose of fully disposing of the case here, further admit and mutually agree as follows, viz:

That the Alexandria and Nebraska City Railroad Company was originally the Alexandria and Bloomfield Railroad Company, chartered by act of the legislature entitled "An act to incorporate the Alexandria and Bloomfield Railroad Company," approved Feb'y 9, 1857, and that the name was changed to the Alexandria and Nebraska City Railroad Company by virtue of the first section of an act of the legislature approved Feb'y 19, 1866, which said first section was adopted by the Alexandria and Bloomfield Railroad Company, and that the Alexandria and Bloomfield Railroad Company was duly organized prior to the 4th of July, 1865, (some time in the fall of 1864;) and it is further agreed that the

23 original capital stock of the Alexandria and Bloomfield Railroad Company was two millions of dollars, ($2,000,000.00,) and that the original capital stock of the Iowa Southern Railway Company was one and a half millions of dollars, ($1,500,000.00,) and the capital stock of the consolidated company, The Missouri, Iowa and Nebraska Railway Company, was increased to thirteen million dollars ($13,000,000) at the date of the consolidation.

JAMES HAGERMAN,
Atty. for Pltf. in Error.
F. T. HUGHES,
Atty. for Deft. in Error.

And afterwards, at the same term of said court, the following judgment was rendered in said cause, to wit:

Judgment of supreme court of Missouri.

MONDAY, *November* 10, 1873.

GEORGE M. OCHILTREE, PLAINTIFF IN ERROR,
vs.
THE IOWA RAILROAD CONTRACTING COMPANY, defendant in error. } Error to Clark circuit court

Now again come the parties aforesaid, by their respective attorneys, and

the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by
24 the said Clark circuit court be in all things affirmed and stand in full force and effect; and that the said defendant in error recover of the said plaintiff in error its costs and charges herein expended, and have execution therefor. Opinion filed.

Which opinion is in the words and figures following, to wit:

Opinion of the court.

GEORGE M. OCHILTREE, PLAINTIFF IN ERROR, *vs.* THE IOWA R. R. CONTRACTING CO., DEFT. IN error. } Error to Clark circuit court.

OPINION OF THE COURT.

The only question in this case necessary to be decided is whether a stockholder in a corporation, who becomes such after the constitutional amendment of Nov., 1870, is liable to the double liability imposed upon stockholders by the 6th section of article 8 of the constitution of 1865 and the provisions of the statute made to carry this constitutional provision into effect.

The position is assumed, and maintained by an elaborate and able argument of counsel, that the liability extends to the stockholders subscribing after the repeal of the double-liability clause as to all debts contracted by the company before the repeal, and to support
25 this position the case of Hawthorn vs. Calif (2 Wallace) is specially relied on.

The argument is based on the doctrine that the rights of creditors cannot be impaired by subsequent legislation, which the case cited abundantly establishes, as well as other decisions by the same court.

But what were the creditor's rights under the double liability statute? Did they go beyond a right to subject the existing stockholders to this provision in the nature of a penalty? Had the creditors any right to anticipate an additional responsibility which did not exist when they gave the credit?

The law which subjected the stockholders to this double liability was in the nature of a penalty, (Kutzer vs. Woodson, 19 Mo., 330,) based upon considerations of public policy, and liable to be repealed upon like considerations. It could only be enforced in the mode and time and against the parties subjected to it. The defendant was not a member of the corporation when this law was in force; he became such after its repeal, and when the law only subjected his stock to the creditors. It is conceded in the agreed case that the defendant had paid up his stock, and that, of course, like other assets of the corporation,
26 was liable to the debt. It cannot be implied, and it certainly was not expressed in his subscription, that it was his contract to assume a liability which neither the law nor his contract inflicted. To so construe it would be wholly unwarranted.

The case of Marcy vs. Clark, (17 Mass., 335,) is relied on, and the opinion of the court in that case is quoted, which says: "As to those who become members after judgment against a corporation, or after a debt has accrued, they voluntarily subject themselves to the inconvenience, having the means to satisfy themselves of the solvency of the company, if they choose to make inquiry. Those who become inhabitants of a

town after a liability for debt is incurred are in the same predicament." And the case of Hoffman vs. The City of Quincy, (4 Wallace, 535,) is to the same effect.

But these decisions are not applicable. It is clear that a person who moves to a town or city subjects himself to such taxation as all other citizens are liable to, and that a new stockholder in a corporation makes his stock liable to its debts, though antecedent to his membership.

But something more than this is claimed here. It is claimed that the new stockholder not only makes the property he puts in the corporation liable to its debts, but assumes a personal responsibility
27 which neither the law nor his contract created. That such a law existed before he subscribed is certainly no ground for the presumption that he had any thought of incurring this personal responsibility at the time of his subscription, seeing that it was repealed.

The creditor cannot complain that any of his rights have been taken away, for when his debt accrued he had no claim whatever against the defendant. His rights against the corporation and its members remain just as they were, and the new subscription in fact increases the capacity of the company to pay the debt. But the personal liability which he seeks against the defendant has no existence, and had none when the defendant became a stockholder in the company.

Another question was discussed in this case, whether this double-liability clause ever did apply to the R. R. company in which defendant took stock, and whether its charter did not exempt it from the provisions of the general statute on this subject. But, upon the view we have taken of the first point, it is unnecessary to examine this question.

28 The judgment is affirmed, all the judges concurring.

W. B. NAPTON.

And afterwards, at the same term of said court, the following further proceedings were had in said cause, to wit:

MONDAY, *November* 17, 1873.

GEORGE M. OCHILTREE, PLAINTIFF IN ERROR,
vs.
THE IOWA R. R. CONTRACTING CO., DEFT. IN error.

Motion of plaintiff in error for rehearing filed.

Which motion is in the words and figures following, to wit:

Motion for rehearing.

In the supreme court of Missouri, Oct. term, 1873.

GEORGE M. OCHILTREE, PLTF. IN ERROR,
vs.
THE IOWA R. R. CONTRACTING COMPANY, deft. in error.
} Error to Clark County circuit court.

Now comes the plaintiff in error in the above-entitled cause, and moves the court for a rehearing, and in support thereof shows:

29 First. That this court, in its opinion, does not pass upon the question of the construction of the constitutional amendment of 1870, its attention not having been called to that precise question, through the inadvertence of counsel for the plaintiff in error.

Second. That the true construction of the constitutional amendment of

1870, changing the law of liability of stockholders from "double" to "single liability," is that "future dues or debts of all corporations shall be secured only by single liability," but that the law as to existing debts at the time of adoption of constitutional amendment shall not be changed. This constitutional amendment, like all statutes, must be construed to operate prospectively, that is, on future debts in all corporations, and not to apply at all to debts in existence at its adoption. The framers of the constitutional amendment, and the people who voted for it, certainly did not intend to change the settled policy of the law of this State still in force, namely, that the law of the remedy as to stockholders should never be altered or impaired as to existing debts.

The following authorities are conclusive that the amendment was intended to apply to future debts only.

Sec. 28, art. 1, constitution 1865, says, in express language, "no law retrospective in its operation can be passed." See, also, Cooley's Constitutional Limitations, 1st edition, 370, where the author says
30 "it is a sound rule of construction to give a statute a prospective operation only, unless its terms show a legislative intent that it should have a retrospective effect."

M. & M. R. R. Co. vs. Macon County Court, 41 Mo. 453.

Third. If this construction is placed upon the amendment, then it is decisive of the case in favor of plaintiff in error.

The constitutional provision of 1865 was in the nature of a mandate from the people to the law-making power to regulate future dues of corporations on "bases of double liability."

The amendment was a similar mandate to regulate future dues of corporations on "bases of single liability."

JAMES HAGERMAN,
Atty. for Pltf. in Error.

And afterwards, at the same term of said court, the following further proceedings were had in said cause, to wit:

31 *Motion for rehearing overruled.*

MONDAY, *December* 1, 1873.

GEORGE M. OCHILTREE, PLTF. IN ERROR,
vs.
THE IOWA R. R. CONTRACTING CO., DEFT. IN error.

Now again come the parties aforesaid, by their attorneys, and the court having heard and fully considered the motion of the said plaintiff in error to set aside the judgment heretofore rendered in this cause, and for a rehearing herein, doth overrule the same.

Clerk's certificate.

STATE OF MISSOURI, *ss:*

I, Josiah Thornburgh, clerk of the supreme court, held at St. Louis, of the State of Missouri, certify the foregoing to be a full, true, and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remains of record and on file in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office in the city of St. Louis, this second day of July, A. D. 1874.

[SEAL.]

J. THORNBURGH, *Clerk*,
Per JOS. F. BAIER, *D. C.*

32 In the Supreme Court of the United States.

GEORGE M. OCHELTREE, PLFF. IN ERROR,
vs.
THE IOWA RAILROAD CONTRACTING COMPANY, stockholders in the Missouri, Iowa & Nebraska Railroad Company, deft. in error.

Petition for allowance of writ of error.

Your petitioner, the above-named plaintiff in error, George M. Ocheltree, a citizen of the State of Missouri, prays the allowance of a writ of error to the supreme court of the State of Missouri in the above-stated cause. And petitioner submits herewith a copy of the record of said cause in the said supreme court of the State of Missouri, duly certified.

Petitioner further states that said suit was instituted for the purpose of recovering from the above-named defendant in error, as stockholder in the Missouri, Iowa and Nebraska Railroad Company, a sum of money alleged to be due to petitioner as a judgment-creditor of said company, and for the collecton of which he prayed that an execution might

33 issue and be enforced against the property of the said defendant in error, as provided by laws of Missouri in force when said debt was contracted.

And your petitioner further states that on the trial of said cause there was drawn in question the construction of sec. 10, art. 1, of the Constitution of the United States, under and by virtue of which your petitioner claimed the right to recover, and under and by virtue of which your petitioner also claimed that a provision of the constitution of the State of Missouri of 1870, as applied to petitioner's claim, is null and void, in that it impairs the obligation of a contract. The said provision of the constitution of Missouri of 1870 is a provision changing the liability of stockholders in corporations organized under the law of that State from double to single liability; that is to say, by the constitution of Missouri, as it stood prior to November, 1870, every such stockholder was liable to the creditors of the corporation for the full amount of his stock, and, in addition, for the full amount of unpaid instalments thereon, whereas by an amendment of said constitution, made in 1870, stockholders in such corporations were declared to be liable only for such unpaid instalments.

34 And your petitioner shows that his debt was contracted when the double-liability law was in force, and the double-liability law entered into and became part of his contract, and that the remedy sought is the remedy promised by the law when the debt was contracted. And your petitioner further states that the judgment rendered by said supreme court of Missouri in said cause is final, and that said court is the highest court of said State having jurisdiction of the controversy, and that it involved the above-mentioned question of the construction of a clause of the Constitution of the United States, which question was decided adversely to the right claimed by petitioner. All which will more fully and at large appear by reference to the transcript of the record in said cause herewith submitted. Wherefore petitioner prays the allowance of a writ of error as provided by law.

GEO. W. McCRARY,
JAMES HAGERMAN,
Attorneys for Plff. in Error.

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Missouri before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between George M. Ochiltree, plaintiff in error, and the Iowa Railroad Contracting Company, stockholders in Missouri, Iowa and Nebraska Railway Company, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision
36 was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said George M. Ochiltree, as by 'is complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States. together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the twelfth day of August, in the year of our Lord one thousand eight hundred and seventy-four.

Issued August 12, 1874.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—
SAM. F. MILLER,
Asso. Jus. Sup. Court U. States.

37 The United States of America, to the Iowa Railroad Contracting Company, stockholders in the Missouri, Iowa and Nebraska Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein George M. Ochiltree is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff

in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this 12th day of August, in the year of our Lord one thousand eight hundred and seventy-four.

SAM. F. MILLER.

38 A true copy of within citation received, and service of same waived, this 1st day of September, 1874.

F. T. HUGHES,
Atty. for Defendant in Error.

39 Know all men by these presents that we, George M. Ochiltree, as principal, and Wm. Bishop, as sureties, are held and firmly bound unto Iowa Railroad Contracting Company in the full and just sum of five hundred dollars, to be paid to the said Iowa Railroad Contracting Company, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this eighth day of August, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas lately, at a term of the supreme court of the State of Missouri, in a suit depending in said court between George M. Ochiltree, plaintiff in error, and Iowa Railroad Contracting Company, defendant in error, was rendered against the said George M. Ochiltree, on the 10th day of November, 1873, and the said George M. Ochiltree having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Iowa Railroad Contracting Company, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said George M. Ochiltree shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

(Signed) G. M. OCHILTREE. [L. S.]
(Signed) WM. BISHOP. [L. S.]
[L. S.]

Approved.
(Signed) SAM. F. MILLER,
Asso. Jus. Sup. Court.

(Indorsement on cover:) No. 486, George M. Ochiltree, plaintiff in error, vs. The Iowa Railroad Contracting Company, stockholders in Missouri, Iowa and Nebraska Railway Company. Missouri sup. court. Filed 9th September, 1874.

In the Supreme Court

OF THE UNITED STATES.

GEORGE M. OCHILTREE, Plaintiff, in Error, *Against* THE IOWA RAILROAD CONTRACTING COMPANY, Stockholder in Missouri, Iowa & Nebraska Railway Company, Defendant in Error.	October Term, 1874.

Error from Supreme Court of Missouri.

STATEMENT OF FACTS.

This case originally arose in the Circuit Court of Clark County, Missouri, on a motion filed by plaintiff in error, for execution, against the defendant in error, as stockholder in the Missouri, Iowa & Nebraska Railway Company, on a judgment theretofore rendered in said Court, in favor of plaintiff and against the Railroad Company.

The motion was founded on Section 11, Chapter 62, G. S. 1865, of Missouri, known as "the double liability" law, and which provided that in judgments against corporations, if an execution should be issued against the corporation, and returned "*nulla bona*," then by motion in the Court where the judgment was rendered, an execu-

tion might be obtained against any stockholder in the corporation, who was such stockholder *at the time of the issuance of said execution against the corporation*, to an extent equal in amount to the amount of stock owned by such stockholder, and any amount unpaid thereon.

The facts stated in the motion are conceded to be true.

MOTION FOR EXECUTION.

"The plaintiff states that on the 24th day of January, 1873, he recovered judgment in the Circuit Court of Clark County, Missouri, aforesaid, against the Missouri, Iowa & Nebraska Railway Company, a corporation existing under the laws of this State, for the sum of four thousand one hundred and nineteen 25-100 dollars, and ninety-six 15-100 dollars costs, the said judgment drawing interest at the rate of six per cent. per annum from date; that said judgment was rendered for claims for services and money advanced by said plaintiff, and for services rendered by Samuel M. Young and E. Pratt Buell to the Alexandria & Nebraska City Railroad Company, a corporation formerly existing under the laws of this State; that said claims of Young and Buell were for value assigned to plaintiff; that said claims all accrued during the year beginning April, 1869, and ending April, 1870; that on the—— day of May, 1870, the said company and the Iowa Southern Railway Company, a corporation then existing under the laws of the State of Iowa, were, pursuant to the laws of Iowa and of this State, duly consolidated by resolution of the Board of Directors of each of said companies, into one corporation, under the corporate name and style of the said Missouri, Iowa & Nebraska Railway Company; that the claims aforesaid at the date of consolidation were due and owing to plaintiff, and that by said consolidation the Missouri, Iowa & Nebraska Railway Company became liable

therefor under the laws of this State, and also by express provisions made in said articles of consolidation; that at the time said debts were contracted by the said Alexandria & Nebraska City Railroad Company, the stockholders of said company at the time of issuing execution, or return of same *nulla bona*, were liable to an extent equal in amount to the amount of stock by them owned, together with any amount unpaid thereon; that at the time of consolidation aforesaid, when the said Missouri, Iowa & Nebraska Railway Company became liable for said debts, the stockholders of said company at time of issuing of execution, or return of same *nulla bona*, were liable to an extent equal in amount to the amount of stock by them owned, together with any amount unpaid thereon: that the law of liability of stockholders, as aforesaid, entered into and became part of the contract of indebtedness aforesaid; that plaintiff, since obtaining judgment as aforesaid against said company, has caused execution to be issued from this Court on same, which execution has been returned *nulla bona* and unsatisfied; that the said Iowa Railroad Contracting Company is now, and was at the time of issuing of execution aforesaid, a stockholder in said Missouri, Iowa & Nebraska Railway Company; that said Iowa Railroad Contracting Company, a corporation existing under the laws of Iowa, then owned and still owns eight thousand, nine hundred and sixty shares of stock in said Missouri, Iowa & Nebraska Railway Company, each share being for $100.

Wherefor plaintiff prays that an execution may issue on said judgment against said Iowa Railroad Contracting Company, for enough to satisfy said judgment, interest and costs."

To this motion the defendant filed an answer, and the case was disposed of by the Circuit Court, upon the following agreed statement, to-wit:

AGREED STATEMENT OF FACTS.

"Now come the parties, plaintiff and defendant, by their attorneys, and for the purposes of this suit, file this their agreed statement of facts:

1st. Admit that the debts were valid debts contracted by Alexandria & Nebraska City Railroad Company, between May 1st, 1869, and May 1st, 1870, and that judgment was rendered thereon against the Missouri, Iowa & Nebraska Railway Company, on January 24th, 1873, for $4119.25-100, that execution was issued and returned *nulla bona*, as charged in plaintiff's motion.

2nd. Admit the consolidation of the Alexandria & Nebraska City Railroad Company, May 2d, 1870, with Iowa Southern Railway Company, forming Missouri, Iowa & Nebraska Railway Company, and that said Missouri, Iowa & Nebraska Railway Company became obligated to pay the debts of the Alexandria & Nebraska City Railroad Company.

3d. Admit that debts of plaintiff were due and owing by the Alexandria & Nebraska Railroad Company at the date of said consolidation.

4th. Admit that at times debts accrued, defendant was the owner of no stock in said Alexandria & Nebraska City Railway Company, that he was the owner of no stock at the date of consolidation of said companies, in either company. That the stock defendant now holds, is stock originally subscribed for and paid up in full, since the amendment to the eighth article, section six, of the Constitution of the State of Missouri, which amendment was adopted November, 1870, being stock subscribed to the original capital stock of said Missouri, Iowa & Nebraska Railway Company, and issued by said company, since said constitutional amendment of 1870.

5th. Admit the stock in question is not the proceeds of any of the stock of either the Alexandria & Nebraska City Railway Company, or the Missouri, Iowa & Nebraska Railway Company, issued prior to the said amendment to the said constitution.

That it is not stock received in lieu of, or on account of any stock surrendered or held by any stockholders in Alexandria & Nebraska City Railway Company, or by any stockholders in Missouri, Iowa & Nebraska Railway Company, prior to the adoption of said constitutional amendment.

6th. Admit that the defendant owned the shares of stock at the time execution was issued in this cause, and at the time same was returned *nulla bona*, and still owns same, as alleged in the plaintiff's motion."

Upon the trial the plaintiff, as required by the practice of the Courts of Missouri, asked the following declarations of law:

PLAINTIFF'S DECLARATIONS OF LAW.

The plaintiff asks the following declarations of law:

1st. "That section 6 of article 8 of the constitution of this State, which took effect on the 4th day of July, 1865, and section 11 of chapter 62, passed pursuant to said constitution, applied to existing corporations as well as subsequent corporations, and therefore it applied to stockholders in the Alexandria & Nebraska City Railroad Company, and after its consolidation with the Iowa Southern Railway Company, to the defendants, the Missouri, Iowa & Nebraska Railway Company."—Given.

2nd. "That the true construction of the constitution and statute aforesaid, is that the stockholders in all corporations existing at the time of the return of the execution unsatisfied against the company, upon a debt contracted after July 4th, 1865, and before

constitutional amendment of 1870, were subject to the double liability clause, without reference to the time when they became stockholders."—Refused.

3d. "That the law in force at the time plaintiff contracted his debt with the Alexandria & Nebraska City Railway Company, and when the Missouri, Iowa & Nebraska Railway Company, became obligated to pay the said debt of plaintiff, and which regulated the liability of stockholders, entered into, and became a part of the contract of indebtedness between plaintiff and said companies, and the constitutional amendment of 1870, could not alter the liability of stockholders, without impairing the obligation of a contract within the meaning of section 10 of article 1 of the constitution of the United States."—Refused.

4th. "The conract between plaintiff and the company, was that the stockholders in the company at the time of return of execution *nulla bona*, without reference to when they may have subscribed to stock, should be liable and nothing could alter that contract without impairing its obligation."—Refused.

5th. "The fact that defendant subscribed to the stock of said Missouri, Iowa & Nebraska Railway Company, after the constitutional ammendment of 1870, cannot relieve him from double liability for debts contracted after July 4th, 1865, and before the amendment of 1870, because he became a subscriber, knowing in contemplation of the law of the contract with plaintiff, and he voluntary put himself in a position where plaintiff could call on him to respond as a stockholder of the company existing at the time of return of execution. The defendant enjoying the benefits of said company equally with other stockholders, he is subject to the same liability. The law under which this debt was contracted nowhere requires the plaintiff to look to any stockholders other

than those existing at the time of return of execution *nulla bona*, and it is not for him to enquire when they became stockholders." —Refused.

The first declaration as asked was given, and each of the others was refused. The defendant asked no declarations of law.

The Circuit Court found for defendant.

The case was carried by writ of error to the Supreme Court of the State.

While the case was pending in the Supreme Court of Missouri, the parties filed the following agreement, to-wit:

"For the purpose of fully disposing of the case here, it is further admitted that the Alexandria & Nebraska City Railroad Company was originally the Alexandria & Bloomfield Railroad Company, chartered by act of the Legislature, entitled, "an act to incorporate the Alexandria & Bloomfield Railroad Company," approved February 9, 1857, and that the name was changed to that of the Alexandria & Nebraska City Railroad Company, by virtue of the first section of an act of the Legislature, approved February 19, 1866, which said first section was adopted by the A. & B. Company; and that the Alexandria & Bloomfield Railroad Company was duly organized prior to the 4th of July, 1865, (sometime in the fall of 1864); and it is further agreed that the original capital stock of the Alexandria & Bloomfield Railroad Company was two million of dollars, and that the original capital stock of the Iowa Southern Railway Company was one and a half million of dollars, and that the capital stock of the consolidated company, the Missouri, Iowa & Nebraska Railway Company, was increased to thirteen million dollars at the date of the consolidation."

The questions squarely presented in the Supreme Court of Missouri, may be stated in this way.

The law in force when plaintiff's debts accrued against the Alexandria & Nebraska City Railroad Company, and still in force when the Missouri, Iowa & Nebraska Railway Company, became liable therefor, and expressly agreed to pay same, provided for "double liability" against "any stockholder" who should be such *at the time of issuance of execution* on a judgment to be recovered against the corporation. This law was attempted to be repealed in November, 1870, and the defendant subscribed to the capital stock after that time.

The plaintiff claimed the right to enforce "double liability" against defendant, under the law in force when his contract was made.

The defendant claimed exemption from "double liability" by reason of the alleged repeal of "double liability law," and his subscription to stock thereafter. The plaintiff therefore insisted that if by a true construction of the repealing law, it was intended to apply to debts existing at the time of the repeal, then it impaired the obligation of plaintiff's contract within the meaning of the constitution of the United States. The Supreme Court of Missouri decided against plaintiff, in favor of defendant, and affirmed the judgment of the Circuit Court.

The plaintiff brings the case here by writ of error.

The parties have agreed to submit the case on printed arguments, that a decision may be had at this term. The constitutional provisions and statutes of Missouri, with the decisions of the highest Courts thereon, bearing on the questions, will be found set out in the argument.

The plaintiff assigns the following errors, to-wit:

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of Missouri, erred in affirming the judgment of the Circuit Court of Clark county in overruling the motion of plaintiff.

II.

The Supreme Court erred in not reversing the judgment of the Circuit Court, and in not sustaining plaintiff's motion.

III.

The Supreme Court erred in not holding that the constitutional amendment of November, 1870, section 6, article 8, of constitution of Missouri, was null and void as to rights of plaintiff in this case, because in depriving plaintiff of his remedy against stockholders under the law in force when his debts were contracted, and when the consolidated company became liable therefor, the said amendment impaired the obligation of plaintiff's contract within the meaning of section 10, Art. 1, constitution of the United States.

IV.

The Supreme Court erred in holding that the fact that defendant subscribed after constitutional amendment of 1870, relieved it from double liability as to plaintiff's debts.

V.

The Supreme Court erred in holding defendant exempt from double liability, as to debts of plaintiff.

VI.

The Supreme Court erred in not holding that defendant was subject to double liability, the same as if the said constitutional amendment had never had an existence.

VII.

The judgment of Supreme Court was for the wrong party and against the law.

ARGUMENT.

I.

What was the law of Missouri in force when the debts of the plaintiff in error were contracted?

This is the pertinent enquiry. The fundamental proposition upon which plaintiff relies is, that he is entitled to proceed to the collection of his judgment, under the law in force when his debts accrued. The *time* when his debts accrued, so far as this case is concerned, can be taken to be either when the Alexandria & Nebraska City Railroad Company contracted them, or when the Missouri, Iowa & Nebraska Railway Company became obligated to pay them under the law, and expressly agreed to pay them in its articles of consolidation.

At both dates the law in force was identical. To simplify the issue and avoid looking beyond the consolidation, we can rely upon the contract of the Missouri, Iowa & Nebraska Railway Company to pay plaintiff's debts, and upon which contract plaintiff recovered the judgment on which this motion is based.

Among the laws in force at this time, and still in force, was the following:

"47. The Legislature may, at any time, alter or amend this chapter, but such alteration or amendment shall not," &c., "take away or impair any remedy given against any such corporation, its stockholders or officers for any liability which shall have been previously incurred." G. S. 1865, Sec. 47, Ch. 63, page 343. This law applied to railroad corporations, and entered into and became part of the contract between plaintiff and the M. I. & N. R'y Company. Whatever remedy was promised plaintiff, he is still

entitled to, because the express contract was that this remedy should not be altered or impaired. Section 6, Article 8, of the constitution of the State of Missouri, G. S. 1865, page 40, adopted July 4th, 1865, read as follows :

" *VI. Dues from private corporations shall be secured by such means as may be prescribed by law; but in all cases each stockholder shall be individually liable, over and above the stock by him or her owned, and any amount unpaid thereon, in a further sum at least equal in amount to such stock.*"

The following statutory provisions were enacted to carry out and enforce the constitutional provision :

"11. If any execution shall have been issued against the property or effects of a corporation, and if there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon, provided always, that no execution shall issue against any stockholder, except upon an order of the Court, in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open Court, after sufficient notice in writing to the persons sought to be charged; and upon such motion, such Court may order execution to issue accordingly."

"12. The clerk or other officer having charge of the books of any corporation, on demand of any officer holding any execution against the same, shall furnish the officer with the names, places of residence, (so far as to him known,) and the amount of liability of every person liable, as aforesaid." G. S. 1865, Sections 11 and 12, Ch. 62 page 328.

The foregoing constitutional provision and statutory provisions,

were in force when the debts of plaintiff in error were contracted and when the Missouri, Iowa & Nebraska Railway Company became obligated to pay, and expressly agreed to pay them.

The Supreme Court of Missouri, as early as March, 1869, construed the constitutional provision and foregoing sections, and held that they imposed the double liability on the stockholders who owned stock at the issuance of execution, and not upon the stockholders who owned stock at the time of the contract.

McClaren vs. Franciscus, 43 Mo. 452.

This case has since been reaffirmed, and the doctrine is well settled.

Miller vs. Republic Ins. Co. 50 Mo. 55.

And this doctrine is in harmony with the following Massachusetts authorities:

Curtis vs. Harlon, 12 Metcalf 3.

Marcy vs. Clark, 17 Mass. 335.

See also Nixon vs. Green, 11 Exch. 550.

These authorities go to the extent of making the stockholders existing at the time of issuance of execution responsible, although they subscribed after debt was contracted, and even after judgment.

We may say, without referring in detail to the authorities, that numerous statutes in this country and England have been passed for enforcing "double liability" or "joint and several liability," against stockholders in corporations, and these statutes have been frequently before the Courts for construction. While the different statutes have fixed the liability against stockholders at different times, some at time debt was contracted, some at time of judgment, some at time of issuance of execution; yet it has ever

been the policy of the law to fix some certain time, and make all the stockholders at that time, "the appointed time," liable.

In the language of the Supreme Court of California, (Larabee vs. Baldwin, 35 Cal. 174 *et seq.*) "The principle adopted by the Legislature makes every stockholder liable," &c. "The entire body of stockholders, for the time being, is personally liable for the entire debt contracted.—an entire set of stockholders is liable for every debt."

The time under the Missouri statute was the issuance of the execution, and no other time. The attention of the Court is particularly directed to the able opinion of Judge Wagner, in McClaren vs. Franciscus, *ante*, the leading case, where the Court holds that "the double liability" rests upon the stockholders at time of issuance of execution, and not at time of contract as under the old law. The Court commends the wisdom of the law.—We extract a portion of the opinion, (43 Mo. 465 *et seq.*) Speaking of the constitution and statute of 1865, the Court says:

"The words employed are general in the constitution. 'In all cases each stockholder shall be individually liable.' In the statute they are: 'If there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders.' In the first place the debt is the debt of the corporation, and not of the individual stockholder; the remedy against the corporation must be exhausted and proved ineffectual before resort can be had to the private shareholder. A corporation is a permanent body with the qualities of succession and perpetuity; its members may die, or be changed by transferance of stock, but it remains the same. The Legislature and the constitution intended that the property of this body should at all times be liable for the debts contracted by it. For this purpose the coporation was made liable to be sued, and, but lest at any time the corporation should fail to pay its debts, a remedy was applied against that tangible body, which at all times, must be appended to it, namely: the members. Now the inquiry is, what members? It is clear the law contemplates the members of a fluctuating body; one that may be daily and even hourly changing, though the corporation, as

such, is to remain permanent. But still the tangible body, though perpetually shifting, must be equally permanent with the corporation, since there must be stockholders so long as there is stock; and, of course, there must always be individuals to be called upon in the case of a failure of the Company to pay their debts. The mode by which these changes take place is easy—a simple transfer on the books, passes the title and effects a substitution of parties. It invests one person with all the rights, privileges and immunities of memberships; causes another to cease to be a member, and deprives him of all right thereafter to act or be heard in the management of the affairs of the Company. And yet, if the theory of the defendant's counsel is correct the latter is to all intents and purposes, in relation to their creditors who became such while he was a member, a member still, though not as to any right to participate in the profits, but merely to share the loss. He becomes a victim to others—immolated at the mercy of the corporation and its creditors. In vain he appeals to the creditors to secure their debts while corporate property remains in abundance; and equally vain is it for him to appeal to the justice of the members of the corporation. He has no power to coerce, to advise, to participate in the management or share in the profits, if the business is successful; but he has the consolation of being allowed to pay if unsuccessful through mismanagement, imprudence and dishonesty, or disaster. Possibly the Legislature may have intended to produce such a state of things, but I am not sufficiently credulous to believe it. Corporations do their business in part, at least, upon credit; and as by law the stockholders as well as the corporation are made liable to be sued for the debts, it was certainly contemplated that those members should be liable who were such at the time the default was made by the principal body."

In the concluding portion of the opinion the Court show that the law in force prior to 1865, imposed "the double liability" on those who were stockholders at date of contract, but that the constitution and statute of 1865 changed the rule and imposed the liability on those only who were stockholders at the issuance of execution against the corporation.

The case from which we quote, and the other cases cited, show beyond any question, that under the law of Missouri the stockholders at time of issuance of execution were subject to "double

liability," although they may have become such, for the first time, only a day or an hour before the execution issued. Other authorities clearly establish the doctrine that those who are shown to be stockholders at "the appointed time," by the books of the Company, are subject to the personal liability, although they may have in fact transferred their stock, in good faith, for value, to another. Unless the books show the transfer, they are liable, as if the transfer had not been made.

In Worrell vs. Judson, 5 Barb, 210, the defendant had sold his stock and transferred his certificate to the vendee, but the stock had not been transferred on the books of the corporation, and it was held that he was liable for a debt contracted by the Company.

In Rosefelt vs. Brown, 11 N. Y., 148, the Court of Appeals held that when stock had been transferred on the books of the Company, as collateral security for the payment of a note, the pledgee was liable as stockholder for the debts of the Company, and that the Court below properly rejected proof, showing that the transfer was merely by way of pledge on the ground &c., that the creditors of the corporation could not be required to look beyond the stock record of the Company to ascertain who were the owners thereof, and that any other rule would work a great injustice to the creditors of a corporation, and tend to render the statute inoperative, as the creditor could never tell whom he could proceed against to collect his debt, in the event of the insolvency of the corporation. (Stanley vs. Stanley, 13 Ship. 191.)

We see, therefore, that the law of Missouri in force when plaintiff's debts accrued, and when consolidated Company agreed to pay them, authorized the enforcement of "double liability" against "any stockholder" at issuance of execution. In other words, looking at the law then in force, assuming that it has not been re-

pealed, then the plaintiff is entitled to the remedy he is asking against this defendant. Indeed, this was expressly admitted by the defendant's counsel in their argument below, and was conceded by the Supreme Court of Missouri. There is no question, nor never has been, in the minds of the bar, or Courts of Missouri, since the decision in McClaren vs. Franciscus, (*ante*) but what "the double liability" was to be enforced only against those stockholders at issuance of execution, and against any or all stockholders at that time.

In Miller vs. Republic Ins. Co., 50 Mo. page 56–7, the Court reiterated the doctrine of McClaren vs. Franciscus, and held that where the stockholder who was such when debt was contracted, had regularly transferred his stock, before issuance of execution, on the books of the Company, he was not liable, because he was not a stockholder at the time appointed by the law, namely, the issuance of execution.

We wish to impress the law of Missouri at time of plaintiff's contract, upon the mind of this Court, because that law is the *premise* upon which we shall base our argument of the unconstitutionality of the alleged repealing law.

II.

What was plaintiff's contract? Having ascertained what the law of Missouri was at the date of contract, and knowing, as we do, that the law then in force entered into and became part of the contract, the same as if it had been written out upon parchment, and subscribed by the parties, we are prepared to answer this question?

The contract with the plaintiff was on the part of the Alexandria & Nebraska City Railroad Company. "Trust the Company

and you shall have for your security, first, the responsibility of the corporation, second, "the double liability" of all the stockholders at issuance of execution. When your debts mature, should the corporation refuse to pay, you can go into a Court of Justice and recover judgment. On that judgment you can have your execution, and the property of the corporation thus subjected to the payment of your debts. Should it happen that the corporation is insolvent, or no property can be found upon which to levy and make your debts, then you may proceed upon motion in the Court, where you obtained your judgment against "any stock holder," or all stockholders, who are such at the issuance of the execution, for the amount of their stock, and any amount unpaid thereon. To ascertain who are the stockholders at that time, the Sheriff shall go to the clerk or officer having charge of the books of the Company, and he shall furnish the necessary information. Your remedy shall be against the stockholders existing at the time of issuance of the execution.

You shall not have to inquire when they became stockholders, nor look further than the books of the Company to find who they are. Your only inquiry will be who were stockholders when you failed to make your money out of the corporation. These stockholders shall be your security, and against them you may proceed."

The same contract precisely was made between plaintiff and the Missouri, Iowa & Nebraska Railway Company, on the 2d day of May, 1870, when the consolidation took place. The responsibility of the M. I. & N. R'y Co., and the responsibility of the stockholders therein, *who should be such at the issuance of execution, on the judgment which plaintiff might recover*, was then and there voluntarily pledged to the plaintiff. The law said further to the

plaintiff, in express and positive language, that this remedy against the Company and its stockholders should not be taken away or impaired. (See Sec. 47, Ch. 63.) On the faith of these promises made by THE LAW MAKING POWER OF THE STATE, the plaintiff consented to become the creditor of the A. & N. C. R'y Co. The voice of THE LAW MAKING POWER of the State authorized the formation of a new corporation, composed of the mingled elements of this Company and the Iowa Company, and gave to plaintiff every right against the new which he had against the old Company.

The consolidated Company expressly agreed to pay these debts. We have now seen what the law of Missouri was when debts accrued, and what the contract was.

Could the law be changed so as to take from plaintiff the remedy promised him when his debts accrued? We shall see.

III.

The constitutional amendment of 1870, *Section* 6, *Article* 8, *as applied to debts existing against corporations at the time of its adoption is null and void in that it impairs the obligation of contracts within the meaning of Section* 10, *Article* 1, *of the Constitution of the United States.*

Green vs. Biddle, 8 Wheaton, 1.
Bronson vs. Kinzie, 1 Howard, 311.
McCracken vs. Hayward, 2 Howard, 228.
Woodruff vs. Trapnel, 10 Howard, 190.
Curran vs. State of Arkansas, 15 Howard, 304.
Corning vs. McCullough, 1 Comstock, 47.
Conant vs. Van Shaick, 24 Barbour, 87.
Hawthorn vs. Calef, 2 Wallace, 10.

Von Hoffman vs. City of Quincy, 4 Wallace, 535.
Gunn vs. Barry, 15 Wallace, 610.
White vs. Hart, 13 Wallace, 654.
Sturges vs. Crowninshield, 4 Wheaton, 122.

Provident Savings Inst. vs. Jackson Skating and Bathing Rink, 52 Mo. 552. 1 Kent, (12 edition,) 419, *et seq* and notes.

The amendment which was adopted in November, 1870, reads as follows:

6. "*Dues from private corporations shall be secured by such means as may be prescribed by law; but in no case shall any stockholder be individually liable in any amount over or above the amount of the stock owned by him or her.*"
1st Wagner, (Ed. 1872,) page 67.

The authorities cited are relied upon to show this amendment unconstitutional in its application to debts existing at its passage.

The doctrine is so fully settled in these cases as to need nothing but a reference to them. They all go to the point that the law in force at the time of the making a contract enters into and becomes part of the contract, and any subsequent legislation that *hinders, obstructs, or in any way materially* impairs the remedy, is null and void.

In Bronson vs. Kinzie the Court held "where a mortgage contained a power to the creditor to sell on breach of the condition, and thereby pay the debt; and this power was valid under the laws of Illinois when given,—that a law subsequently passed giving to the mortgagor twelve months to redeem the property from the purchaser at such sale, and prohibiting it from being made for less than two thirds of its appraised value, so altered the remedy

of the creditor as to impair the obligation of a contract." In speaking of the connection of the remedy with the right, Chief Justice Taney said, "It is the part of the municipal law which protects the right and the obligation by which it enforces and maintains it. It is this protection which the clause in the Constitution now in question was mainly intended to secure. And it would be unjust to the memory of the distinguished men who framed it, to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this union by placing them under the protection of the constitution of the United States." In McCracken vs. Hayward the Court held "that a State law which prohibits property from being sold on execution for less than two thirds the valuation made by appraisers pursuant to the directions contained in the law, impairs the obligation of contracts, and is inoperative upon executions issuing on judgments founded on contract." The Court used the following significant language:

"The obligation of the contract between the parties in this case was to perform the duties and undertakings contained therein: *the right of plaintiff was to damages for the breach thereof; to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. * * * * Any subsequent law which denies, obstructs or impairs this right by superadding a condition, &c., is void.*"

In Hawthorne vs. Calef, the Court held "a State Statute repealing a former Statute which made Stockholders in a chartered Company liable for the Corporation's debts to the amount of their stock is as respects creditors of the corporation existing at the time of the repeal, a law impairing the obligation of contracts and void." This case is very analagous to the one under consideration, and the attention of this Court is especially directed to it.—The Court, after saying that the case falls within the principle of Woodruff vs. Trapnal, Curran vs. State of Arkansas, and Bronson vs. Kinzie, in speaking of the liability of stockholders and the repeal of same, remark, "*The creditor had this security, when the debt was contracted with the Company over and above its responsibility.* This remedy the repealing act has not merely modified to the prejudice of the creditor, but has altogether abolished, and thereby impaired the obligation of his contract with the company." And the Supreme Court of the United States, the ultimate tribunal on this question, reversed the Supreme Court of the State of Maine, which had sustained the repealing Statute. In Von Hoffman vs. the city of Quincy, it is decided,

1. "Where a statute has authorized a municipal corporation to issue bonds and to exercise the power of local taxation in order to pay them, and persons have bought and paid value for bonds issued accordingly, the power of taxation thus given, is a contract within the meaning of the Constitution, and cannot be withdrawn until the contract is satisfied. The State and the corporation in such a case are equally bound.

2. "A subsequently passed statute which repeals or restricts the power of taxation so previously given is, in so far as it effects bonds bought and held under the circumstances mentioned, a nullity.

3. "It is the duty of the corporation to impose and collect the taxes in all respects as if the second statute had not been passed.

4. "If it does not perform this duty a *mandamus* will lie to compel it."

How, we ask, could the doctrine be more clearly illustrated than by these decisions, that even the execution laws in force when contract is made, enter into and become part of the contract and cannot be impaired, much less destroyed, by subsequent legislation.

A contract can no more be impaired by Constitutional Amendment than by Statute.

Dodge vs. Woolsey, 18 Howard, 331.
State of Missouri vs. Cummings, 4 Wallace, 277.
In the matter of Oliver Lee & Co's Bank, 21 N. Y., 9.
State vs. Miller, 50 Mo., 129.

IV.

The fact that defendant became a stockholder in the Missouri, Iowa & Nebraska Railway Company after Constitutional Amendment of 1870, can not effect plaintiff's rights.

The contract of plaintiff was made first in order of time. The defendant assumed the burdens of a stockholder. It was bound to know the old law. We commend to the defendant the language of the Supreme Court of Massachusetts, in Marcy vs. Clark, 17 Mass., 335. "All who are members of the corporation are virtually defendants in the action, and have an opportunity to be heard in the form they have chosen by joining the company. *As to those who become members after judgment against a corporation or after a debt has accrued they voluntarily* subject themselves to the inconvenience, having the means to satify themselves of the solvency of

the company if they choose to make inquiry. Those who become inhabitants of towns after a liability for debt is incurred, are in the same predicament."

The Constitutional amendment of 1870, could only say to defendant, "you are relieved from double liability as to future debts of the company, but you are subject to double liability as to existing debts." If the amendment assumed to say anything else, then it *presumed to violate plaintiff's contract* This could not be done. When defendant became a stockholder, section 47, chapter 63, G. S., (being section 47, article 2, chapter 37, 1st Wagner,) said to it "the remedy of a creditor against the company, its stockholders and officers, shall not BE TAKEN AWAY OR IMPAIRED." To show the absurdity of defendant's position, we wish to illustrate from Von Hoffman vs. City of Quincy. Suppose that a citizen of Quincy, who had gone there and become a resident of the city, and who had taken with him his property to the city, after the passage of the law limiting the amount of taxes, should have claimed that his property was not subject to taxation to a greater amount than the limit fixed by the new law, because forsooth the State had said to him by an act of the legislature, that he should not be taxed. Would not the Court have answered, "The rights of the bondholders accrued first. The law said to them when they bought the bonds, that when the bonds matured a judgment might be recovered against the city, and a mandamus would compel the payment of the judgment by the levy of a sufficient tax. The tax should be levied on all the property within the limits of the city without reference to the time when it was brought there. The contract with the holders of the bonds must be upheld. The tax shall be levied just the same as if the new law had not been passed."

So as to the rights of the plaintiff in this case; the Constitutional amendment is as if IT HAD NEVER BEEN. The plaintiff proceeds to collect his judgment under the law in force when the corporation's liability accrued.

Suppose again this kind of a case. A corporation, with a capital stock of two million dollars, and only one million of the stock subscribed, is in debt to a party who trusted it, when only one or two or five shares of the stock had been subscribed. Suppose the Legislature frames a law saying that all payments for future subscriptions of stock shall be exempt from execution upon past debts. Suppose that the remaining million of capital stock is taken and paid for by the subscriber.

Suppose the money paid for this new stock is converted into bonds, placed in the vaults of the corporation, and held by it as unincumbered assets. Suppose the old creditor recovers judgment on his debt contracted before the law, and before the subscription to the remaining capital stock. An execution issues and the bonds, the proceeds of the payments of stock are seized. Can the corporation claim them as exempt? No! To hold them exempt would be to destroy the creditors' right. True, they were not in existence when the creditor trusted the company, yet they are liable to be seized for his debt because he trusted the capacity of the corporation to acquire future property, and future subscriptions, just as much as he did the property it possessed at the time of his contract.

Could the new stockholders complain? No! because they should have known the law, that it could not tamper with the sacred rights of the corporations creditors. An analagous principle to this was settled by this Court at an early day. In Sim-

ges vs. Crowninshield, 4 Wheaton, 122, where it was held that a State insolvent law could not discharge contracts existing at its passage, chief Justice Marshall in delivering the opinion of the Court, says:

"It has been contended that, as a contract can only bind a man to pay to the full extent of his property, it is an implied condition that he may be discharged on surrendering the whole of it. But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents and integrity, constitute a fund which is as confidently trusted as property itself. *Future acquisitions* are, therefore, liable for contracts; and to release them from this liability impairs their obligation."

In the light of this authority what reason is there in the opinion of the Supreme Court of Missouri in this case, (54 Mo. 117,) where the Court held that plaintiff had no right to anticipate an additional responsibility which did not exist when the credit was given.

The Court below puts the question in the form of an interrogation? "Had the creditors a right to anticipate an additional responsibility which did not exist when they gave the credit?"

With all due respect to that high tribunal we answer yes! if for no other reason, *because the law promised the additional responsibility, and the law was part of the contract between plaintiff and the Company.*

The Court below said that the right to proceed against stockholders was in the nature of a penalty. We think this erroneous. Hawthorne vs. Calef, 2d Wallace, (although the Supreme Court

of Maine held the double liability as of the nature of penalty,) establishes that the double liability is *a security*, not a penalty.

We call the particular attention of the Court to the decision of the Supreme Court of Missouri in the case of Provident Savings Institute vs. Jackson Skating and Bathing Rink, 52 Mo., 552. In that case the Court held that the constitutional amendment of 1870 was null and void, because it impaired the obligation of the creditors' contract. The proceeding was to enforce double liability against stockholder who was such when debt was contracted, and down to and at the time of issuance of execution. The decision is in entire harmony with our views. We submit these suggestions with reference to it as perfectly unanswerable. The stockholder was not liable under the Missouri law, because he was such at time of contract, but solely because he was such at issuance of execution. Under the law, as we have seen, the time of subscription is an entirely immaterial matter. If he is stockholder at the appointed time, it matters not when he subscribed. If the facts had disclosed simply that the stockholder was such at time of contract, he could not have been held liable. If the facts had shown that he was stockholder at issuance of execution, he would be liable, although he only subscribed the day before.

The fact, therefore, that the stockholder was such at time of contract, ought not to have had a feather's weight one way or the other, in determining that case.

We wish now to meet one by one the reasons urged by defendant's counsel, and the Court below, to the effect that the Constitutional amendment of 1870 protects the defendant from double liability. They do not pretend to deny that, if it were not for the amendment, the plaintiff would be entitled to his remedy against

defendant as one of the stockholders existing at the time of issuing of execution against the company. They cannot argue against McClaren vs. Franciscus, 43 Mo., that plaintiff's right to execution, if it were not for the amendment, would be against "any stockholder existing at issuing of execution against company."

Let us see whether defendant's counsel and Court below are supported in their statement that Hawthorn vs. Calef, 2d Wallace, page 10, is not applicable to this case. A thorough examination of this case convinces us that on principle it fully sustains our position.

The statute of Maine was different from the statute of Missouri. The broad principle decided applies to both statutes with equal force. The statute of Maine applied to stockholders existing at the time the debt was contracted. The Missouri statute applies to the stockholders existing at time of issuing execution on judgment against the corporation.

The Supreme Court of Maine had held that the contract was between the creditor and the corporation, and not between the creditor and stockholder; that the remedy against the stockholders was purely statutory, given by statute, and could be repealed by statute. The arguments of counsel on the case before the Supreme Court of the United States, were directed to this proposition.

Mr. Justice Nelson in his opinion, at page 22, says: "Now it is quite clear that the personal liability clause in the charter in the present case pledges the liability or guarantee of the stockholders, to the extent of their stock, to the creditors of the Company, and to which pledge or guarantee the stockholders, by subscribing for stock and becoming members of it, have assented. They thereby

virtually agree to become security to the creditors for the payment of the debts of the Company, which have been contracted upon the faith of this liability.

Can there be any misunderstanding the meaning of the Court? The law made a certain pledge or promise to the creditors of the Company;—the stockholders entered the Company;—therefore, they impliedly consented that *the promise of the law* should be carried out.

Again the learned Judge says at page 23, there is another view equally conclusive against the judgment of the Supreme Court of Maine. "This view rests upon the principle decided in Bronson vs. Kinzie, and the several subsequent cases of this class," &c.—After stating what these decisions were, the Judge proceeds, "Now, applying the principle of this class of cases to the present one, by the clause in the charter subjecting the property of the stockholder he becomes liable to the creditor in case of the inability or insolvency of the Company for its debts, to the extent of his stock. The creditor had this security when the debt was contracted with the company, over and above its responsibility. This remedy the repealing act has not merely modified to the prejudice of the creditor, but has altogether abolished, and thereby impaired the obligation of *his contract with the Company.*"

"CONTRACT WITH THE COMPANY."

Here, then, is a declaration in the opinion of the Court that the contract with the company, not the contract with the stockholders, was impaired by withdrawing the liability of the stockholders.—The distinction is evident. The contract was with the company, not with the stockholders; but the law in force when debt was contracted, as an incident to the contract with the company, and

to secure the creditors, imposed a liability on the stockholders.—The liability of the stockholders did not depend on their contract. We could well imagine a case where a stockholder not only refused to be liable, but opposed the contract made by the company; yet he would be liable under the law equally with other stockholders, because the law imposed the liability upon him "*nolens volens.*"

We say, without fear of successful contradiction, that the decision in Hawthorn vs. Calef, does not depend at all upon the fact that the statute of Maine made the stockholders at the time of contracting the debt responsible. The decision would have been the same had the liability have been imposed on the stockholders existing at any other period of time, at the maturity of the debt, or at the date of judgment, or at the issuing or the return of execution against the company. The liability of the stockholders was enforced, not because the stockholders had made a contract with the creditor, but because the company had made a contract with the creditor, and the law at the date of the contract had promised the creditor the remedy against the stockholders. As was said by the Court in Curran vs. State of Arkansas, "The obligation of a contract in the sense in which these words are used in the constitution is that duty of performing it which is recognized and enforced by the laws. And if the law is so changed, that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same." The position of defendant's counsel that there was no privity of contract between plaintiff and defendant, is fully answered. There need have been no privity of contract. The law imposed the liability on the stockholders. The law had the right to impose this liability, owing to the peculiar relations existing between the company and its stockholders. The law of the remedy as in force when contract

was made must continue in undiminished vigor, else the obligation of plaintiff's contract is impaired.

The law of the remedy, the law which enforces the contract, is the obligation of the contract, or at least a vital and important part of the obligation. Gunn vs. Barry, 15 Wallace, 623.

We also call the attention of the Court to White vs. Hart, 13 Wallace, page 554, where a constitutional provision of State of Georgia, that took away a remedy existing when contract was made, was held to be null and void as to contracts existing at the time of the passage of the constitutional provision. The Court said: "The proviso which seeks to work this result, is, so far as all pre-existing contracts are concerned, itself a nullity. It is to them as ineffectual as if it had no existence." Cooley's Constitutional Limitations, page 290, lays down the sound doctrine.

"And in any case the lawful repeal of a statute cannot be made constitutionally to destroy contracts which have been entered into under it."

In answer to the position of defendant's counsel that plaintiff did not trust to defendant's responsibility, we have this to say :— The plaintiff certainly did not trust to the responsibility of those stockholders who held stock when his debts were contracted, or when the new company assumed to pay them. The law gave him no claim on those stockholders as such. He trusted the responsibility of those stockholders who should be in existence when he failed to make his judgment on execution against the company.— What was the promise of the law to him?

Look at section 11, chapter 62, G. S. 1865, page 328, as interpreted by this Court in McClaren vs. Franciscus. The promise

of the law to the plaintiff was that on failure to make his judgment out of the company, he should have an execution against "any of the stockholders existing at time of issuing execution against the company." He was to have execution, not against those who owned stock when debts were assumed, not against those who owned the stock which had been subscribed when the debts were assumed, but he was to have execution against any stockholder who owned stock at that time, namely, the time of issuing execution, without any reference to when the stock was subscribed whether before or after the contract. To this promise of the law, we repeat, the plaintiff trusted.

If the amendment of 1870 had not been passed, no stockholder could have escaped this liability by coming into Court and pleading, "Oh! I am not liable. I was not a stockholder when the contract was made. I am not the owner of any stock which had then been subscribed. I have subscribed since the debt was created, and the stock has been issued since then. The plaintiff did not trust to me."

Would not the Court have promptly, instantly responded "you were a stockholder at the time when the law promised a remedy against any and all stockholders. It matters not when you subscribed. The judgment creditor of the corporation is not restricted to a remedy against a particular class of stockholders. His remedy is against any person who owns stock at a certain time."

The position of the defendant's counsel that the law in force when contract of subscription was made by defendant, must govern its liability is equally unsound when applied to this case.

The defendant entered a corporation knowing that it had been in existence under the double liability clause of Constitution of

1865. The defendant knew, because it was its duty as a prudent person to know, that the company owed certain debts. The defendant knew this, because the articles of consolidation provided for the payment of these debts, for therein the new company agreed to pay. The defendant also must have known that the constitution and law of 1865 had pledged to plaintiff the double liability of stockholders who should own stock at issuing of execution against the company. Notwithstanding all this knowledge, and notwithstanding the defendant knew that the law in express language had declared that plaintiff's remedy against stockholders existing at issuance of execution, should never be impaired, the defendant entered the company, and thereby, in the language of the 5th instruction of the plaintiff, "voluntarily put itself in a position where plaintiff could call on it to respond as a stockholder of the company existing at the time of issuance of execution."

The defendant like all other persons, natural and artificial, was bound to know the law. It knew that the liability of all stockholders existing at the issuing of execution against the company had been solemnly pledged to the plaintiff. The defendant's counsel and the Court below concede that the defendant would be responsible, if it had owned stock, when debt was assumed, or was the assignee of such stock. We ask where is any law that exempts defendant from the same burden that rests on other stockholders of the Company? All of the stockholders are subject to same burdens, all enjoy same benefits. All are participants in the same enterprise, with equal rights and equal obligations. The constitutional amendment of 1870 applies to all, and assumes to give no stockholder superior privileges over others. You can not divide the constitutional amendment and say it is null and void as to a certain class of stockholders, and valid and binding as to another

class. It is binding on all stockholders or none. We contend that it is binding on all stockholders without reference to when they subscribed as to future debts, but as to debts existing at the time of its adoption, it is without any force whatever. Cooley's Constitutional Lim., page 180.

Suppose that plaintiff had filed his motion in the Circuit Court against some person who was a stockholder, or assignee of a stockholder, who owned stock when his debt accrued, and who still owned the stock at the issuing of execution. Suppose the execution had been ordered, and the money made out of such stockholder. Suppose then, *that* stockholder had sued other stockholders, among them the defendant, for contribution. Would he not have been entitled to contribution from the defendant? Could defendant set up with any kind of show of success that he was only subject to single liability. Most assuredly not!!! To hold so would be to destroy the whole theory of the law as to responsibility of stockholders. The stockholders must share equally the triumphs and defeats of the company. The benefits, like the sunshine, are enjoyed by all. The burdens as the dews from heaven must fall alike on all.

In the language of the Supreme Court of California, in case of Larabee vs. Baldwin, (*ante*) "The principle adopted by the legislature makes every stockholder liable," &c. "The entire body of stockholders for the time being is personally liable for the entire debt contracted,—an entire set of stockholders is liable for every debt." The entire body of stockholders at a certain time was made liable. *The time* under the California statute and Maine statute was when debt was contracted. *The time* under the Missouri statute was at the issuance of execution against the company. And the entire body of stockholders at that time, "the appointed time,"

was subject to double liability. We repeat, to interpret the amendment of 1870, so as to make a part of the stockholders at "the appointed time" subject to "double liability," and a part subject to "single liability," would do violence to the equality of right and obligation which the law meant to impose on all stockholders at that time.

The attention of the Court is again called to section 47, chapter 63, G. S. 1865, page 343. This section provides that the remedy against the company or its stockholders shall not be taken away or impaired for any liability which shall have been previously incurred. What remedy? None other than that provided in section 11, chapter 62, G. S. 1865, page 328. The law then promised plaintiff that as to his debt section 11 should never be impaired or taken away. What remedy does section 11 provide? It gives a remedy—a remedy against "any stockholder" existing at issuance of execution against the company. The plaintiff then was promised his remedy against "any stockholder," no matter when he subscribed. The plaintiff has proceeded against a stockholder who was such "at the appointed time," but the stockholder says "I am exempted by constitutional amendment of 1870." If defendant is exempted then plaintiff has not his remedy against "any stockholder;" his contract is impaired—the sacred promise of the law is broken. The plea of defendant can not avail that the law has made a contract with it. From the nature of plaintiff's contract, first in order of time, it was impossible for defendant to escape double liability if it should happen to be, as it did happen to be, stockholder at "the appointed time" when plaintiff's right to proceed against "any stockholder" accrued. And as to plaintiff's rights, "the double liability" law was in force when defendant subscribed, and defendant was bound by it.

A moments reflection will show how unjust, upon principle, to the plaintiff is the defendants plea of exemption from "double liability." The plaintiff trusted a corporation with a capital stock of thirteen million of dollars. True, the stock was not all subscribed, nor scarcely any portion of it, but subscriptions to it were authorized. The capital stock represented what might be the resources of the company, *its capacity for future acquisitions*. Yet this was not his inducement to give the credit. The law that imposed "the double liability" on the members who should own this stock at issuance of execution was his best security, and to that he trusted, and of that he is to be deprived, and his reliance upon the stability and permanency of the law shall prove his loss. It is true, (and we may well assume it without introducing anything outside of the record,) that plaintiff trusted the M. I. & N. R'y Co., in its infancy, and trusted solely *its future property and future stockholders.*

We insist, therefore, that if the constitutional provision of 1870 was intended to apply to debts existing at its passage, it is unconstitutional, and should be held for naught, treated as an absolute nullity.

The Court below held defendant exempt for two reasons, and only two.

1. Because of amendment of 1870.

2. Because of subscription to capital stock after the amendment.

The foundation, therefore, of the exemption is the amendment of 1870. Treat that as a nullity, "as if it had never had an existence," and you take away the foundation, and the defence falls to the ground!

We may sum up our position in this way. Without the amendment plaintiff would be clearly entitled to the remedy he is asking. The amendment is subsequent to plaintiff's contract. The amendment as interpreted by the Court below deprives plaintiff of his remedy. *This is the very test of its unconstitutionality.*

IV.

We have heretofore argued this case upon the hypothesis that the construction given by the Supreme Court of Missouri, to the amendment of 1870 is correct, and if correct, we claim it to be in conflict with the constitution of the United States. We are prepared, however, to take the position *that the true construction of the amendment is that it does not apply to debts existing at its passage, but only to debts to be contracted in the future.* This question was presented to the Court below briefly in the motion for rehearing.

The Court overruled the motion, but expressed no opinion, and we think overlooked the question entirely. Compare the original constitutional provision of 1865, and the amendment of 1870.—The provision says :

"*Dues from private corporations shall be secured by such means as may be prescribed by law,*" &c., upon the basis of "double liability." The amendment says : "*Dues from private corporations shall be secured by such means as may be prescribed by law,*" &c., but only upon the basis of "single liability." Now *dues* certainly mean debts, obligations. What dues, or debts, or obligations?

We claim, by every rational rule of construction, that future dues, or future debts, or future obligations, are meant, and not

past or existing dues, or debts, or obligations. Will any one contend that the provision of 1865 applied to debts existing at its passage; that double liability was by it imposed upon stockholders at issuance of execution, for past or existing debts? Certainly not! (The constitution of Missouri in addition to a provision prohibiting the impairing of contracts, has a provision that "no law retrospective in its operation," shall be passed. Sec. 28, Const. of Mo., page 23, G. S., 1865.) The meaning of the constitutional provision of 1865, and the amendment of 1870, is evident. Each is a constitutional mandate to the legislature to regulate by appropriate legislation the responsibility of stockholders in all private corporations on the basis of "double liability" and then of "single liability." Of course the required legislation was to be *prospective* in its operation. *All debts of all corporations* contracted in the future were to be secured by "double liability." afterwards "single liability" of stockholders.

It is always laid down as a rule of construction, that, to avoid injustice or unconstitutionality, a statute is to be taken as prospective only, unless its language is inconsistent with that interpretation.

McEwen vs. Deer, 24 Howard, 242.
Quackenbush vs. Danks, 1 Denio, 128.
Atkinson vs. Dunlap, 50 Maine, 111.
Harvey vs. Tyler, 2 Wallace, 328.
Plumb vs. Sawyer, 21 Conn. 351.
Taylor vs. Keeler, 30 Conn. 324.
Torrey vs. Corliss, 33 Maine, 333.
Hopkins vs. Jones, 22 Ind. 310.
Seamans vs. Carter, 15 Wis. 548.
Boston & Maine R. R. vs. Cilley, 44 N. H., 578.

Sedgwick on Statute and Const'l Law, 188 *et seq.*

Cooley's Const'l Lim., (3d Ed.) 370, and note 3.

The same rule of construction is applicable to constitutions as to statutes.

State *ex rel* M. & M. R'y Co., vs. County Court of Macon County, 41 Mo., 457 *et seq.*

V.

A word or two more and we submit the case. We ask was not one of the great objects of the double liability law to compel the stockholders to see to it that the corporations paid their debts?—The law imposed the liability on stockholders existing at issuance of execution, in order to bring the stockholders to a realizing sense of their position if they should seek to have the corporations evade their debts. The stockholders were "the power behind the throne." If no personal responsibility attached to them the company might easily evade an execution. We can safely say in this very case, that should this motion of plaintiff be granted, and execution accordingly ordered, the defendant, "the power behind the throne" in the Missouri, Iowa & Nebraska Railway Company, which can speak as to the management and operation of the Company with nearly a million voices (one voice for each share of stock,) will, "by moral suasion," induce the company to pay off the plaintiff's judgment. The Missouri, Iowa & Nebraska Railroad is in running operation, daily transporting freight and passengers through the States of Iowa and Missouri. It is submerged in mortgages given to construction companies, &c., and plaintiff can not make his judgment—he can not find whereon to levy his execution. Under these circumstances he asks that remedy which the law promised him when he became the creditor of the

railroad company. If that remedy is given him in undiminished vigor, his judgment is worth dollar for dollar; if denied, his judgment is not worth the paper on which it stands recorded. We think, we have shown, that plaintiff is entitled to the unrestricted remedy in force when his debts accrued against the railroad company. He has exhausted his remedy against the principal, the railroad company, and he now asks the promised remedy against the security, the stockholders, at issuance of execution.

Respectfully submitted,

JAMES HAGERMAN, and
GEO. W. McCRARY,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

GEORGE M. OCHILTREE,
PLAINTIFF IN ERROR,

VS.

The Iowa Railroad Contracting Company
STOCKHOLDERS IN THE
MISSOURI, IOWA & NEBRASKA RAILWAY CO.,
DEFENDANT IN ERROR.

ERROR FROM SUPREME COURT OF MISSOURI.

In the Supreme Court of the United States.

GEORGE M. OCHILTREE,
PLAINTIFF IN ERROR,
VS.
The Iowa Railroad Contracting Company
STOCKHOLDERS IN THE
MISSOURI, IOWA & NEBRASKA RAILWAY CO.,
DEFENDANT IN ERROR.

October Term,
1874.

ERROR FROM SUPREME COURT OF MISSOURI.

STATEMENT BY DEFENDANT IN ERROR.

The plaintiff in error in this cause obtained a judgment in his favor and against the Missouri, Iowa & Nebraska Railway Company, upon a debt contracted with the Alexandria and Nebraska City Railroad Company, which debt was contracted between May, 1869, and the 1st day of November, 1870.

The Alexandria and Nebraska City Railroad Company was originally the Alexandria and Bloomfield Railroad Company, chartered by act of the General Assembly of the State of Missouri, approved Febru-

ary 9, 1857. The name was changed in 1866, by authority of law, to the Alexandria and Nebraska City Railroad Company, and in May, 1870, the said Alexandria and Nebraska City Railroad Company was consolidated with the Iowa Southern Railway Company, of Iowa, and the consolidated company thus formed adopted the name of the Missouri, Iowa & Nebraska Railway Company, and by that name is now known.

On the 4th of July, 1865, a new constitution for the State of Missouri went into effect. Section 6, of article 8, of said new constitution, was as follows:

"§VI. *Dues from private corporations shall be secured by such means as may be prescribed by law; but in all cases each stockholder shall be individually liable over and above the stock by him or her owned, and any amount unpaid thereon in a further sum at least equal in amount to such stock.*"

This is what is commonly known as the double liability clause. To enforce the provisions of this section, the Legislature enacted the following section:

Section 11, Chapt. 62, Gen. Stat., 1865, being Section 13, page 291, Wag. Stat.

"§ 11. If any execution shall have been issued against the property or effects of a corporation, and if there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned together with any amount unpaid thereon, provided always that no execution shall issue against any stockholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged;

and upon such motion, such court may order execution to issue accordingly."

Under the provisions of this section, the plaintiff in error filed his motion in the Circuit Court of Clark County against the defendant in error, as a stockholder in the Missouri, Iowa and Nebraska Railway Company.

The motion was as follows:

MOTION FOR EXECUTION.

GEORGE M. OCHILTREE, *Plaintiff*, *vs.* IOWA RAILROAD CONTRACTING COMPANY, Stockholder in Missouri, Iowa & Nebraska Railway Company, *Defendant.*	In the CIRCUIT COURT of CLARK COUNTY, Missouri, May Term, 1873.

The plaintiff states that on the 24th day of January, 1873, he recovered judgment in the Circuit Court of Clark County, Missouri, aforesaid, against the Missouri, Iowa & Nebraska Railway Company, a corporation existing under the laws of this State, for the sum of four thousand one hundred and nineteen 25-100 dollars, and ninety six 15-100 dollars costs, the said judgment drawing interest at the rate of six per cent. per annum from date; that said judgment was rendered for claims for services and money advanced by said plaintiff, and for services rendered by Samuel M. Young and E. Pratt Buell to the Alexandria & Nebraska City Railroad Company, a corporation formerly existing under the laws of this State; that said claims of Young and Buell were for value assigned to plaintiff; that said claims all accrued during the year beginning April 1869, and ending April, 1870; that on the

—day of May, 1870, the said company and the Iowa Southern Railway Company, a corporation then existing under the laws of the State of Iowa, were, pursuant to the laws of Iowa and of this State, duly consolidated by resolution of the Board of Directors of each of said companies, into one corporation, under the corporate name and style of the said Missouri, Iowa & Nebraska Railway Company; that the claims aforesaid at the date of consolidation were due and owing to plaintiff, and that by said consolidation the Missouri, Iowa & Nebraska Railway Company became liable therefor under the laws of this State, and also by express provision made in said articles of consolidation, that at the time said debts were contracted by the said Alexandria & Nebraska City Railroad Company, the stockholders of said company at the time of issuing execution, or return of same *nulla bona*, were liable to an extent equal in amount to the amount of stock by them owned, together with any amount unpaid thereon; that at the time of consolidation aforesaid, when the said Missouri, Iowa & Nebraska Railway Company became liable for said debts, the stockholders of said company at time of issuing of execution, or return of same *nulla bona*, were liable to an extent equal in amount to the amount of stock by them owned, together with any amount unpaid thereon; that the law of liability of stockholders, as aforesaid, entered into and became part of the contract of indebtedness aforesaid; that plaintiff, since obtaining judgment as aforesaid, against said company, has caused execution to be issued from this court on same, which execution has been returned *nulla bona* and unsatisfied; that the said Iowa Railroad Contracting Company is now, and was at the time of issuing of execution aforesaid, a stockholder in said

Missouri, Iowa & Nebraska Railway Company; that said Iowa Railroad Contracting Company, a corporation existing under the laws of Iowa, owns eight thousand nine hundred and sixty shares of stock in said Missouri, Iowa & Nebraska Railway Company, each share being for $100.

Wherefore plaintiff prays that an execution may issue on said judgment against said Iowa Railroad Contracting Company for enough to satisfy said judgment, interest and costs.

JAMES HAGERMAN,
Attorney for Pl'ff.

To this motion, the defendant answered as follows:

ANSWER.

GEORGE M. OCHILTREE, *Plaintiff*,
against
IOWA RAILROAD CONTRACTING COMPANY,
Stockholders in the Missouri & Nebraska Railway Company, a corporation,
Defendant.

In the Circuit Court, Clark County, May Term, A. D. 1873.

Now comes defendant, and for cause why execution should not issue against her as stockholders in said railway company, as prayed for in plaintiff's motion, says as to whether the judgment as stated in plaintiff's motion was rendered for claim for services and money advanced by plaintiff, and for services rendered by Samuel M. Young and E. Pratt Buell, to the Alexandria & Nebraska City Railway Company, a corporation formerly existing under the laws of this State, and as to whether all the claims of said Young and Buell,

were assigned to plaintiff for value, and as to whether all said claims accrued during the year beginning April, 1869, and ending April, 1870, this defendant has no knowledge or information sufficient to form a belief, and asks for proof. Denies that at the time the said debts were contracted by the said Alexandria & Nebraska City Railway Company, the stockholders of said company at the time of issuing of execution, or return of *nulla bona*, were liable to an extent equal in amount to the amount of stock by them owned, together with any amount unpaid thereon.

Deny that at the time of the consolidation, as stated in plaintiff's motion, the Missouri, Iowa & Nebraska Railway Company became liable for said debts, the stockholders at the time of issuing execution, or return of the same *nulla bona*, were liable to an extent equal in amount to the amount of stock by them owned, together with any amount unpaid thereon.

Deny that the law of liability of stockholders entered into, and became a part of, the contract of indebtedness aforesaid.

Admit that execution has issued, and been returned *nulla bona*, against the Missouri, Iowa & Nebraska Railway Company, as stated in plaintiff's motion.

Admit that defendant is now, and was at date of issuing of said execution, the owner of shares of said railway stock, as stated in plaintiff's motion, and that each share is one hundred dollars.

Defendant states the facts to be, that at the time said debts accrued, she was not, nor is she now, the owner of any of the stock of said Alexandria & Nebraska City Railroad Company, nor the owner of any stock issued by the Missouri, Iowa & Nebraska Railway Company, in lieu of any stock surrendered by said

Alexandria & Nebraska City Railway Company, and that no stock, as last or before described, appears upon any books of either the Alexandria & Nebraska City Railway Company, nor upon the books of the said Missouri, Iowa & Nebraska Railway Company.

Defendant says that all stock now owned by her has been issued and subscribed for, since the amendment to section 6, article 8, of the constitution of the State of Missouri, adopted November, 1870, and by said amendment she is not liable as set forth in plaintiff's motion.

Defendant further says, that by an act of the General Assembly, approved February 9th, 1867, the Alexandria & Bloomfield Railroad Company was incorporated, and by an amendment thereto, approved—— 1866, the corporate name was changed to that of the Alexandria & Nebraska City Railway Company, and that by articles of consolidation with the Iowa Southern Railway Company, a corporation existing under laws of the State of Iowa, on the——day of May, 1870, the said Missouri, Iowa & Nebraska City Railway Company became, and was incorporated with all the rights, privileges and immunities belonging to the said Alexandria & Bloomfield Railway Company, and that by section 12 of said act, incorporating said Alexandria & Bloomfield Railway Company, the stockholders of said company were exempted from all personal liability on account of debts contracted and created, and this defendant says that said act entered into, and formed part of the contract of said railroad company with the State of Missouri, and pleads said act in bar, of any recovery upon plaintiff's motion.

This defendant, having fully answered, asks to be discharged with her costs.

F. T. HUGHES,
Attorney for Defendant.

Upon the trial, the following agreed statement was entered of record, and thereupon the cause was submitted to the court.

AGREED STATEMENT OF FACTS.

GEORGE M. OCHILTREE, *Plaintiff*,
against
THE IOWA RAILROAD CONTRACTING COMPANY,
Stockholder in the Missouri, Iowa & Nebraska Railway Company,
Defendant.

Motion for Execution.

Now come the parties, plaintiff and defendants, by their attorneys, and for the purpose of this suit, file this their agreed statement of facts:

1st. Admit that the debts were valid debts contracted by the Alexandria & Nebraska City Railroad Company, between May 1st, 1869, and May 1st, 1870, and that judgment was rendered thereon against the Missouri, Iowa & Nebraska Railway Company, on January 24th, 1873, for $4119.25-100, that execution was issued and returned *nulla bona*, as charged in plaintiff's motion.

2nd. Admit the consolidation of the Alexandria & Nebraska City Railroad Company, May 2nd, 1870, with Iowa Southern Railway Company, forming the Missouri, Iowa & Nebraska Railway Company, and that said Missouri, Iowa & Nebraska Railway Com-

pany became obligated to pay the debts of the Alexandria & Nebraska City Railway Company.

3rd. Admit that debts of plaintiff were due and owing by the Alexandria & Nebraska Railway Company at the date of said consolidation.

4th. Admit that at the time debts accrued, defendant was the owner of no stock in said Alexandria & Nebraska City Railway Company, that he was the owner of no stock at the date of consolidation of said companies, in either company. That the stock defendant now holds, is stock originally subscribed for and paid up in full, since the amendment to section six, article eight, of the Constitution of the State of Missouri, which amendment was adopted November, 1870, being stock subscribed to the original capital stock of said Missouri, Iowa & Nebraska Railway Company, and issued by said company, since said constitutional amendment of 1870.

5th. Admit the stock in question is not the proceeds of any of the stock of either the Alexandria & Nebraska City Railway Company, or the Missouri, Iowa & Nebraska, issued prior to the said amendment to the said constitution.

That it is not stock received in lieu of, or on account of any stock surrendered or held by any stockholders in Alexandria & Nebraska City Railway Company, or by any stockholder in Missouri, Iowa & Nebraska Railway Company, prior to the adoption of said constitutional amendment.

6th. Admit that the defendant owns the shares of stock at the time execution was issued in this cause, and at the time same was returned *nulla bona*, and still owns same, as alleged in the plaintiff's motion.

7th. For the purpose of fully disposing of the case

here, it is further admitted that the Alexandria & Nebraska City Railroad Company was originally the Alexandria & Bloomfield Railroad Company, chartered by act of the Legislature, entitled "an act to incorporate the Alexandria & Bloomfield Railroad Company," approved February 9th, 1857, and that the name was changed to that of the Alexandria & Nebraska City Railroad Company, by virtue of the first section of an act of the Legislature, approved February 19th, 1866, which said first section was adopted by the A. & B. Company; and that the Alexandria & Bloomfield Railroad Company was duly organized prior to the 4th of July, 1865 (sometime in the fall of 1864); and it is further agreed that the original capital stock of the Alexandria & Bloomfield Railroad Company was two millions of dollars, and that the original capital stock of the Iowa Southern Railway Company was one and a half million of dollars, and that the capital stock of the consolidated company, the Missouri, Iowa & Nebraska Railway Company, was increased to thirteen million dollars at the date of the consolidation.

JAMES HAGERMAN,
Attorney for Plaintiff.
F. T. HUGHES,
Attorney for Defendant.

The following declarations of law were asked by the plaintiff. The first was given, and the second, third, fourth, and fifth were refused.

PLAINTIFF'S DECLARATION OF LAW.

The plaintiff asks the following declaration of law:
1st.—That section 6 of article 8 of the constitution

of this State, which took effect on July 4th, 1865, and § 11 of chapter 62, General Statutes, passed pursuant to said constitution, applied to existing corporations as well as subsequent corporations, and therefore it applied to stockholders in the Alexandria & Nebraska City Railroad Company, and after its consolidation with the Iowa Southern Railway Company, to the defendants, the Missouri, Iowa & Nebraska Railway Company.

2nd.—That the true construction of the constitution and statute aforesaid, is that the stockholders in all corporations existing at the time of the return of the execution unsatisfied against the company, and a debt contracted after July 4th, 1865, and before constitutional amendment of 1870, were subject to the double liability clause without reference to the time when they became stockholders.

3rd.—That the law in force at the time plaintiff contracted his debt with the Alexandria & Nebraska City Railway Company, and when the Missouri, Iowa & Nebraska Railway Company, became obligated to pay the said debt of plaintiff, and which regulated the liability of stockholders, entered into, and became a part of the contract of indebtedness between plaintiff and said companies, and the constitutional amendment of 1870, could not alter the liability of stockholders, without impairing the obligation of a contract within the meaning of section 10 of Article 1 of the Constitution of the United States.

4th.—The contract between plaintiff and the company, was that the stockholders in the company at the time of return of execution *nulla bona*, without reference to when they may have subscribed to stock should be liable and nothing could alter that contract without impairing its obligation.

5th.—The fact that defendant subscribed to the stock of said Missouri, Iowa & Nebraska Railway Company, after the constitutional amendment of 1870, cannot relieve him from double liability for debts contracted after July 4th, 1865, and before the amendment of 1870, because he became a subscriber knowing in contemplation of the law of the contract with plaintiff, and he voluntarily put himself in a position where plaintiff could call on him to respond as a stockholder of the company existing at the time of return of execution. The defendant enjoying the benefits of said company equally with other stockholders, he is subject to the same liability. The law under which this debt was contracted nowhere requires the plaintiff to look to any stockholders other than those existing at the time of return of execution *nulla bona*, and it is not for him to enquire when they became stockholders.

The judgment below was for the defendant, and the plaintiff brings the cause here by writ of error.

In the year 1870, section 6 of article 8 of the constitution known as the double liability clause, was amended, and the amendment went into effect on the 1st day of November, 1870.

The following is the section as amended:

"VI. *Dues from private corporations shall be secured by such means as may be prescribed by law; but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him or her.*"

The agreed statement shows that the defendant was not a stockholder at the time the debt was contracted, nor at the time the consolidation was effected, *nor at any time prior to the repeal of the double liability.*

That it first became a stockholder after such repeal,

and that the stock now owned by it is not the proceeds of any stock issued prior to such repeal, but is original stock issued to defendant after the repeal.

The circuit court refused to order execution as prayed for, and rendered judgment on said motion in favor of defendant.

From this judgment the plaintiff appealed to the Supreme Court of the State. Defendant made two points in the Supreme Court.

First. That the charter of the Alexandria and Bloomfield Railroad exempted the stockholders in said company from any individual liability and that such exemption being a part of the charter granted prior to the adoption of the double liability clause in the constitution, became a contract between the company organized thereunder, and the State, which contract inured to the benefit of all the stockholders, and that therefore, the constitutional liability afterward created, did not apply to, or effect, any stockholder in the said Alexandria and Bloomfield Railroad Company, nor its successor, the M. I. & N. R. R. Co.

Second. That the defendant, having become a stockholder in the corporation, after the repeal of the double liability clause, by an original subscription of stock, and, having paid for the same in full, he is not liable under said constitution, and the laws passed in pursuance thereof, nor is he liable, in any sum, after having paid for his stock in full.

The Supreme Court of the State, in considering the cause, sustained the views of the counsel, and the circuit court, upon the latter proposition, and thereupon affirmed the judgment of the circuit court. Upon the first proposition, the Supreme Court indicate no opinion, but say in reference thereto:

"Another question was discussed in this case, whether this double liability clause ever did apply to the railroad company in which defendant took stock, and whether its charter did not exempt it from the provisions of the general statute on this subject. But upon the view we have taken of the first point, it is unnecessary to examine this question.—54 Mo., 118.

The plaintiff claims that if the repealing amendment of the constitution is held to apply to subscribers of stock in existing corporations, so as to exempt them from the double liability for the payment of debts contracted while said liability was in force, then such repealing amendent impaired the obligation of such contracts, within the meaning of the Constitution of the United States, and thereupon moved the court for a writ of error, and assigns the following errors:

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of Missouri erred in affirming the judgment of the Circuit Court of Clark County in overruling the motion of plaintiff.

II.

The Supreme Court erred in not reversing the judgment of the Circuit Court, and in not sustaining the plaintiff's motion.

III.

The Supreme Court erred in not holding that the constitutional amendment of November, 1870, section 6, article 8, of Constitution of Missouri was null and void, as to rights of plaintiff in this case, because in depriving plaintiff of his remedy against stockholders under the law in force when his debts were contracted, and

when the consolidated company became liable therefor, the said amendment impaired the obligation of plaintiff's contract, within the meaning of section 10, art. 1, Constitution of the United States.

IV.

The Supreme Court erred in holding that the fact that defendant subscribed after constitutional amendment of 1870 relieved it from double liability as to plaintiff's debts.

V.

The Supreme Court erred in holding defendant exempt from double liability as to debts of plaintiff.

VI.

The Supreme Court erred in not holding that defendant was subject to double liability the same as if the said constitutional amendment had never been in existence.

VII.

The judgment of the Supreme Court was for the wrong party, and against the law.

To this assignment, defendant joins in error and says:

"JOINDER IN ERROR.

"Defendant says it is not true that the Supreme Court of the State of Missouri erred in the judgment as claimed by plaintiff's assignment of errors; but affirms that the judgment of said Supreme Court is correct according to the law and the facts of said cause."

By agreement of counsel, this cause is to be submitted upon printed argument so as to be disposed of at the present term.

ARGUMENT.

In the argument of this cause, we take it for granted that this Court will not call in question the interpretation given by the Supreme Court of the State of Missouri to the effect and intent of the constitutional amendment adopted in November, 1870, viz:

That it is the object and intent of that amendment, to exempt from individual liability—further than the amount of their stock—all stockholders in corporations, who become such by original subscription, after the said amendment took effect; and that such exemption applies to debts contracted prior to said amendment.

This is the interpretation of the law as expounded by the highest court of the State wherein the law exists, and this Court is not now called upon to pass judgment upon the soundness of this interpretation.

The question—as we understand it—which is here presented to the Court, is the effect of the law as thus interpreted upon the plaintiff's rights under the constitution of the United States.

The plaintiff complains to this Court—not that the *interpretation* is erroneous—but, that this being the interpretation, it has the effect of impairing the obligations of plaintiff's contract, as the same existed when the debt was contracted—within the meaning of section 10, article 1 of the Constitution of the United States.

We conceive the law to be too well settled to require argument, or citation, that this Court cannot sit in judgment upon the construction of a State law as expounded by the courts of the State. There lies no appeal to this Court from any such exposition.

The only grounds of error in this case, which gives this court jurisdiction is the one above stated.

That under the law as expounded, it has the effect of impairing the obligations of the plaintiff's contract, and that therefore, as to him, is unconstitutional.

In cases arising under the jurisdiction of the courts of the United States, this Court is not bound to follow the interpretation given by the State courts, to State statutes, although such interpretation will ordinarily be adopted by this Court; but in cases like the present one, coming to this Court for review upon a question of constitutional law, such constitutional question alone will be examined, and such examination will be based upon the construction given to the law by the State court.

Hawthorne *vs.* Calef, 2 Wal., 10.

This is all the answer we propose to the fourth division of of the argument of plaintiff's counsel.

Does the amendment to section 6, article 8, of the Missouri State Constitution, adopted November, 1873, as the same is construed by the Supreme Court of that State IN THE CASE NOW BEFORE THE COURT, *impair the obligation of the plaintiff's contract within the meaning of the Constitution of the United States?*

This is the question, and the only question before the court.

We think it does not.

Had it been held to exempt stockholders, who were such at the time the debt was contracted or who became stockholders at any time before the amendment went into effect, then we concede the plaintiff's proposition

would have been sound, but in considering this case the following facts will not be lost sight of.

1st. That the defendant was not a stockholder in the debtor corporation at the time the debt was contracted.

2nd. Nor was it such stockholder, prior to the adoption of the amendment to the constitution, whereby the double liability of stockholders was repealed.

3rd. That the stock now owned by it is not the proceeds of any stock owned by any stockholder in said corporation, prior to the date of said amendment in 1870.

4th. That it is not stock received in lieu of, or on account of any stock surrendered or held by any stockholder in said corporation prior to the adoption of said amendment in 1870.

5th. That the stock now owned by defendant was originally subscribed for, issued, and paid up, after the adoption of said amendment.

6th. That the capital stock of said company was increased after the debt was contracted, and before defendant became a stockholder.

These facts constitute the distinguishing features between this case, and all the authorities cited by the counsel in support of their position.

The case of McLaren *vs.* Franciscus, 43 Mo., 452, only decides that the assignee of stock who holds it at the time of execution, and not the assignor is liable upon execution.

The plaintiff's counsel rely upon this case, and quote from it to establish the doctrine that *all* who are stockholders *at the time* of execution, are liable, and draw from that the conclusion that the contract of the

plaintiff was that *all* who might be holders of stock at that—as he calls it—the "appointed time" should be liable to contribute personally to the payment of his debt. No such conclusion can be deduced from the opinion; in that case, neither the facts nor the opinion warrant it. Franciscus was the assignee of stock, which was in existence and held by his assignor at the time the debt upon which the judgment had been rendered, was contracted, and the court held that he was liable, and not his assignor.

In Miller *vs.* Republic Insurance Company, 50 Mo., 55, this doctrine is affirmed, and the court hold that Manion, who had been a stockholder, but had transferred his stock before execution issued, was not liable.

It will be seen that these cases do not support the theory of the plaintiff, that *all* stockholders, who are such at the time execution is issued, are liable; they only go to the point that it is *only* those who are such at the date of execution, who are liable, and that if the stock is transferred prior to that time, the liability attaches to the stock, and follows it into the hands of the assignee.

It is clear from the law that there may be those who are then stockholders who are not liable. The execution creditor is directed to apply to the "clerk or other officer," not only to ascertain who are stockholders, but who of such stockholders are liable, and the amounts for which they are liable, and then, lest the "clerk or other officer" may be mistaken in his judgment respecting such liability, the creditor must give to the persons he intends to issue execution against, notice of his intended application.

Why? If *all* who are stockholders are liable, why not issue against them at once?

It cannot be for the reason that a transfer may be in

existence, which is not on the books. Such transfer the court in McLaren *vs.* Franciscus say does not release the person, who, by the books, appears to be a stockholder.

It must be because there are conditions under which one may be a stockholder at the time of execution, and yet not be liable, and he is then entitled to notice in order that he may come into court and show this fact.

The contract of plaintiff, then, was not, that all who might happen to be stockholders at the time his debt was contracted, should be liable to contribute to the payment of his debt.

There is another case decided in Missouri, in reference to this liability, upon which plaintiff relies.

Provident Savings Institution *vs.* Jackson Skating &c. Rink, and Parker, 52 Mo., 552.

This case is not at all in point. Parker was a stockholder in the corporation before the amendment was adopted, and the court follows the cases of Hawthorne *vs.* Calef, and holds that the constitutional amendment does not release stockholders who were such, prior to the amendment.

The cases cited, by the counsel, from other states, and from the decisions of this Court, are equally inapplicable; not one of them decides the point raised in this case.

In Curtis *vs.* Harlow, 12 Met. Mass. 33, there had been no change in the law, between the time the debt was created, and the time that Harlow subscribed for the stock. By the law in force at the time Harlow became a stockholder, all stockholders were, jointly and severally, liable for all the debts of the corporation, until all the stock had been taken and paid in full, and a certifi-

cate of that fact recorded, etc., after which their liability ceased. In other words, the creditor trusted to the whole amount of the authorized stock of the company, and if it was not all taken and paid, the members must make it good to the creditor; but after it was so taken and paid up, and the certificate of that fact recorded, then, the personal liability ceased; and neither the new nor old members were then liable.

As no such certificate had been recorded, the court say that the defendant became a stockholder, with full knowledge of the existing liability.

Suppose the law on this subject had been repealed before he subscribed, would he then have been so liable?

The case of Marcy *vs.* Clarke, 17 Mass., 330-335, only decides that a transfer of stock, made with the fraudulent intent of avoiding the personal liability, will not release the assignor.

The cases of Nixon *vs.* Green, 11 Exch., 550, decides the same question as that in McLaren *vs.* Franciscus, that the stockholders who are such at the time the execution is issued, and not their assignees are alone liable. The question of the effect of a change in the law, prior to the date of subscription, was not raised, and for obvious reasons could not be raised in that case.

In Rosefelt *vs.* Brown, 11 N. Y., 148, the defendant claimed, that although the stock stood upon the books of the company, as transferred to him, yet he was not the real owner, but that it was only transferred to him, as collateral security for a debt due by the real owner. The court held, that the execution creditor was not bound to go beyond the records and books of the corporation to ascertain what private understanding might exist between the assignee and his assignor, but that he

might proceed against the person whose name appeared on the books as the owner of the stock.

In the language of the *Nirie Pirus* Judge quoted, and approved by Edwards, J., in delivering the opinion of the court.

"If the creditor must look beyond the legal title, they can never know against whom to proceed."

This is sound reasoning and in this case we have neither necessity nor desire to call it in question, or subject it to criticism. It has no bearing upon the question before the court. This defendant is not an assignee of stock, previously held by another, but is an original subscriber, and the fact of his non-liability, will appear from the books of the company, by reference to the date of such subscription, and the plaintiff cannot be subjected to the inconvenience or uncertainty alluded to by the learned Judge, in Rosefelt *vs.* Brown.

The case of Hawthorne *vs.* Calef, 2 Wal., 10, is relied upon, and urged upon the attention of the court as being "very analogous to the one under consideration."

That case is very analogous to the case of Provident Savings Institution *vs.* Jackson Bathing and Skating Rink, and Parker—and the distinction which the Supreme Court of Missouri finds to exist between these cases and the one now before the court, is a *clear* and *reasonable* distinction. In both of these cases, the defendant was a member of the corporation at the time the debt was contracted, and continued to be a member after the amendment was adopted, and until the execution had been issued and returned *nulla bona.* The contract of Calef in the one case, and of Parker in the other, was both made under the same law which gov-

erned plaintiff's contract; but here, the law under which the plaintiff contracted had been amended before the defendant made his contract of subscription.

In Von Hoffman *vs.* City of Quincy, 4 Wal., 535, the court decides that a citizen moving to Quincy, after a debt had been contracted by the city, subjects all the property which he takes with him into the corporation, to taxation, for the payment of such debts. It will not be claimed, however, that he subjects any of his property not so taken, into the corporation to such tax. Just so in this case. The defendant puts of his property an amount equal to one hundred dollars per share, for each share of stock he subscribes into the corporation, and this becomes subject to the debts of the corporation, whether contracted before or after his subscription. The law in existence at the time he made his subscription, however did not subject any of his property over and above the par value of his stock to such debts, and this being the *law* of *his* contract, he cannot be made further subject. The Supreme Court saw and recognized this very evident distinction, and the learned and venerable Judge, who delivered the opinion, states it in language better than we are able to command.

In Woodruff *vs.* Trapnell, 10 How., 190, this Court decides that bank bills issued while the law was in force, making them a legal tender in payment of all debts due to the State, still continue to be a legal tender after the law is repealed, and that this is so, whether the notes came into the possession of the debtor, before or after the repeal; but that notes of said bank *issued* after the repeal, are *not* a legal tender. This is just what we claim here, and is the only case in print which we have been able to find. We say that the personal

liability is an incident which attaches to the stock, and follows it into the hands of whoever may become the owner thereof, and that if issued before the repeal, it will be liable, but that if issued subsequent to the repeal, it will not be so subject.

Suppose a debtor to the State of Arkansas, whose debt had been contracted prior to the repeal of the law requiring these notes to be received in payment of such debts, had offered to pay the debt in notes issued *after* the repeal, and had claimed that his contract with the State was, that he should have the right to pay in such money, at any time, regardless of the time when it was issued, would he have been permitted to do so? The court in the case cited, say he would not. That his contract only bound the State to receive such notes as were issued prior to the repeal.

This is clearly expressed by McLean, J., in his opinion delivered in that case. He says: "that the State had the right to repeal the above section may be admitted, and the emissions of the bank subsequently are without the guarantee. But the notes in circulation at the time of the repeal are not affected by it."

The liability of the State upon its notes was regulated by the law governing them when emitted; and so the liability of the stockholder is measured by the law in force at the time he *becomes* a stockholder.

II.

The case therefore, is narrowed down to these questions:

1st. Does a proper interpretation of the constitutional amendment of 1870, exempt those who became stockholders in corporations thereafter, by original

subscription, from the effects of the former constitution, as to debts constructed prior to the amendment?

2d. If that is the proper interpretation of the amendment, does it have the effect of impairing the obligation of plaintiff's contract, within the meaning of the Constitution of the United States?

The first question has been answered by the Supreme Court of Missouri in the affirmative, and from that answer there is no appeal. The second has been answered by the same court in the affirmative, and from that answer, the plaintiff has appealed to this Court.

We fully agree with the proposition of the plaintiff's counsel, that, "the law in force at the time of making a contract, enters into and becomes a part of the contract, and any subsequent legislation that hinders, obstructs, on in any way *materially* impairs the remedy, is null and void.

The first question then is, what forms the obligation of a contract?

In considering this question Mr. Justice Washington in *Ogden vs. Saunders*, 12 Wheat., 257, says:

"It is law which impairs the *obligation* of contracts, and not the contracts themselves, which is interdicted. * * * what is it then, which constitutes the obligation of a contract? The answer is given by the Chief Justice (Marshall) in the case of *Sturgis vs. Crowinshield*, to which I readily assent now, as I did then; it is the law which binds the parties to perform the agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affects its validity, construction, or discharge."

Mr. Justice Baldwin, in his opinion in *McCracken*

vs. Hayward, 2 How., 612, says: "The obligation of a contract consists in its binding force on a party who makes it. This depends on the laws in existence at the time it was made; these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consumated the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the remedies then in force."

"The obligation of the contract, consists in the power and efficacy of the law which applies to, and enforces it, or the payment of an equivalent for non-performance. The obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract."

"That is as I understand it the law of the contract forms its obligation; and if so the contract is fulfilled, and its obligation discharged, by complying with whatever the existing law required in relation to such contract."—Thompson, J., in Odgen *vs.* Saunders, page 302.

The next inquiry is, what is it which impairs the obligation of a contract?

Mr. Cooley, in his treatise on constitutional limitations, refers to all the above authorities, quotes from some of them the same as above quoted, and then says at page 285:

"Such being the obligation of a contract, it is obvious that the right of the parties in respect to it are liable

to be affected in *many ways* by changes in the laws, which it could not have been the intention of the constitutional provisions to preclude." He then quotes from the language of Mr. Justice Washington, in Ogden *vs.* Saunders, in support of this position. After a full review, the learned commentator sums up by laying down a rule, which we conceive, states the law more clearly than any words which we can use: "Whatever belongs to the remedy may be altered according to the will of the State, provided, the alteration does not impair the obligation of the contract; *and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made.*"—Page 286.

This is what we say in respect to the plaintiff's rights in this case; that he has a substantial remedy as it existed at the time of making the contract, and that it has not been impaired in any of its obligations. There must have been stock and stockholders at the time the contract was made, for there cannot exist a corporation without them. This stock must still be in existence, either in the hands of the original owners or their assignees, or, if you say that said stock has been merged in that of the consolidated company, then it must be represented by other stock issued in lieu of such stock surrendered, as is provided by the statute.

Now all this is left to the plaintiff, and it was to this, that he gave his credit, and to this he trusted.

It is not every statute which affects the value of a contract that impairs its obligation. This has been repeatedly decided, in fact, it has been reiterated by this Court in almost every case coming before it and arising under this clause of the Constitution

In the case of Ogden *vs.* Saunders, 12 Wheaton,

at page 258, Mr. Justice Washington says: "It will be found on examination, that there are a few laws which concern the general police of a state, or the government of its citizens in their intercourse with each other, or with strangers, which may not in some way or other, affect the contracts which they have entered into, or may thereafter form. For what are laws of evidence, or which concern remedies—frauds and perjuries—laws of registration, and those which affect landlord and tenant, etc., etc., and a multitude of others which crowd the codes of every State, but laws which affect the validity, construction, duration, or discharge of contracts."

This same doctrine has run through all the cases, and received strong confirmation by this Court in the late case of Curtis *vs.* Whitney, 13 Wal., 70, wherein Mr. Justice Miller uses this language:"

"That a statute is not void because it is retrospective, has been repeatedly held by this Court, and the feature of the act of 1867, which makes it applicable to certificates already issued for tax sales, does not of itself conflict with the Constitution of the United States. Nor does every statute which affects the *value* of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they must be affected in many ways, by State and National legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made, and *enhance the cost and difficulty* of performance, or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution so long as the obligation of performance remains in full force."

This doctrine finds support in the decisions of the

supreme courts of many of the States. In Iowa, Wright, C. J., sums up the doctrine as enunciated by this court, and the supreme courts of a number of the States, and comments upon the conflict upon certain points; but upon this point there is no material conflict.—(See McCormick *vs.* Rusch, 15 Iowa, 127, and authorities cited.)

It has been universally held that a law exempting certain property from execution, is not unconstitutional, whether the same was owned at the time the debt was contracted, or not.

Bronson *vs.* Kenzie, 1 How., 311.
Rockwell *vs.* Hubbell's Adm's, 2 Doug. (Mich.), 197.
Quackenbush *vs.* Banks, 1 Denio, 128.
Moss *vs.* Goold, 11 N. Y., 281.
Maxey *vs.* Loyal, 38 Geo., 531.

It has also been held that a homestead exemption may be made applicable to existing debts; but upon this there is a conflict in the different States.

Hill *vs.* Kepler, 63 N. C., 437.
Hardman *vs.* Downes, 39 Geo., 425.
Contra Homestead cases, 22 Gratt. 266.

We think we may safely assume, with Mr. Cooley, that a law "does not impair it [the contract], provided, it leaves the parties a substantial remedy, according to the course of justice, as it existed at the time the contract was made."

And this leads us to inquire, what was the obligation of the plaintiff's contract *at the time it was made.*

It was the right and power to enforce it according to its terms at the time it was made against those with whom it was made. Now, with whom was it made?

1st, with the corporation, the Alexandria & Nebraska City Railroad Company; and 2nd, with the members of that company. With the first as principal, and with the second as sureties, according to the measure of their individual liability as it then existed; for this could not afterward be changed so as to affect either of the parties to the contract, without impairing its obligation. If diminished, it impaired it as to plaintiff's rights; if increased, it would impair it as to the members' rights. This far, there is no shadow of difference between the counsel for plaintiff and for defendant. But there might be new members added to the corporation by additional subscription of stock.

The question then arises, what would be the measure of their liability? It would certainly be, 1st, to pay the par value of their stock subscription, which was one hundred dollars per share; and 2nd, whatever additional liability of a personal nature the law at the time they subscribe may subject them to. If they voluntarily subscribe while the double liability law is in force, they become subject to its provisions, for the reason that by making such subscription, they thereby enter into this contract of suretyship to the extent of such liability.

But suppose the law of the personal liability is repealed, and that thereafter A. becomes a member by subscribing to the stock, what liability does he assume?

We say he assumes to pay to the corporation, for the benefit of its creditors, the par value of his stock, and no more. The law of his contract fixes the measure of his liability and enters into the contract, and this can be no impairment of the obligation of the creditors' contract, made prior to the repeal, for the reason that he never gave credit to any personal liability, other than that of

the members belonging to the company at the date of his contract. He had no right to assume that others would become members, and could not be said to trust them. If they do become members, they voluntary subject themselves to the liability which the law of their contract imposes, and the obligation of the plaintiff's contract is enhanced; but if they do not, can the plaintiff say that the obligation of his contract is impaired? He has all he trusted. If his security is increased, he has the benefit of his good fortune, and the obligation of his contract is untouched and unimpaired.

We hold then, that the obligation of a contract, within the meaning of the Constitution of the United States, is a valid and subsisting obligation, and not a remote, contingent, speculative, or expectant obligation.

The first cannot be impaired. If, however, the good of the state, and the welfare of her institutions, require that laws should be passed, which may result in cutting off some of these remote and speculative expectancies, the creditor cannot complain. He has all left him to which he trusted, and all that he could reasonably expect.

It is not in accordance with the dictates of a sound, and enlightened policy, to say that because an injudicious law had been enacted, under which a creditor may obtain an advantage, that it shall be so construed as to prevent its future repeal in such a manner as possibly to save from utter ruin, great public improvements, simply to keep open to the creditor a chance to *accumulate* securities for the payment of his debt to which he could not as a reasonable man, be supposed to have trusted.

Here is a corporation chartered for the purpose of

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Here is a corporation chartered for the purpose of

inaugurating and carrying on a great public improvement, but after languishing for years, it is found that under the laws as they exist, capitalists cannot be induced to invest the necessary funds to carry it through. One is willing to invest, say ten thousand dollars, but he is not willing to risk ten thousand more. He finds the company in debt, he is willing to contribute ten thousand dollars toward completing the enterprise, and paying the debts; but he is not willing to sink another ten thousand, on which he is to receive in no way, interest or dividend.

The State proposes to aid the enterprize, and enable it to obtain funds for completion, and to pay its debts, and so repeals the obnoxious clause. Shall all this enlightened policy and good intentions of legislation be rendered fruitless because some Shylock comes forward and demands "his pound of flesh?" Our courts should surely be as wise as Portia, and give to him his "bond," no less, no more.

What is it? It is the right to exhaust all the effects of the corporation, including the price of subscriptions of stock, whether made prior or subsequent to the repeal of the personal liability, and the further right to an amount from each subscriber equal in amount to his stock, who was such at the date of his contract, or who voluntarily assumed this obligation, by becoming such while the same law was in force.

He cannot say that his security is impaired because of the defendant not being subject to the double liability. The defendant refused to subscribe under that condition, and only put in his means after its repeal. The plaintiff has all the security he had before, and the additional amount of defendant's paid-up stock.

"*To fall within the constitutional prohibition, the legisla-*

tion must be such as affects the contract directly and not incidentally, or only by consequence."

Von Hoffman *vs.* City of Quincy, 4 Wal., p. 553.

It cannot apply to this case where it is only the *incident* of individual liability that has been repealed.

But the plaintiff says that the law gives the creditor a right to proceed against *all* who are stockholders at the date of execution, and that therefore that was a part of the obligation of the plaintiff's contract. We have, we think, shown that this is a mistake, that it is not *all* who are stockholders at the time of execution, but *only* those who were then such stockholders, as are affected by the law that was in force at the date of plaintiff's contract. The law means, that as between the assignor or assignee of stock, that the assignee who holds the stock at the date of execution, and not the assignor, who might have held it at the date of the contract, is liable on such stock, and this is the full force and the only force of decisions of the Supreme Court of Missouri in the cases of McLaren *vs.* Franciscus, and of Miller *vs.* Republic Insurance Company.

III.

But the plaintiff says that this would make the burdens upon the stockholders unequal, and would be therefore wrong as to them. To use his own language, page 33 of argument: "To hold so would destroy the whole theory of the law as to stockholders. The stockholders must share equally the triumphs and defeats of the company. The benefits, like the sunshine, are enjoyed by all. The burdens, as the dews of heaven, must fall alike on all."

The plaintiff is not called upon in this case to de-

fend the rights of the stockholders, but if he was, he would certainly find by a close examination of the authorities which he cites, and from his own reasoning, that nothing is more fallacious than this "sunshine" and "dew drop" theory. He concedes that in all cases where a personal liability is imposed, that there is an "appointed time" at which the liability is to attach.. In some cases, as in Maine and California, it is to such as are stockholders at the date of contract; in others at the date of judgment, and in others as in the law of Missouri, to those who are such, at the date of execution.

Now, the counsel will not pretend, upon careful reflection, to say that one who is not a stockholder at the "appointed time," but who is such afterward, shall share any of these burdens. There may be some stockholders who will be individually liable for all the debts of the corporation, others who will be so liable for a part, and yet again, others who will be subject to no personal liability whatever.

If the stockholders who were such at the time of, or prior to, the repeal of the personal liability law, do not wish to receive others into the corporation under circumstances which would make them unequal in the burdens to be assumed, they could close their books and sell no more stock, or take it all to themselves. They have the whole matter under their control, and have no right to complain, and *do not* complain that those who subscribe after the repeal are exempt from these burdens.

And the creditor has no reason to complain, if the sale of stock is continued after the repeal. It does not impair his contract, but betters it. Nor could he complain if they then closed the books, and refused to sell,

for he has all the remedy that he had when he contracted. He trusted to the corporation and stockholders then in existence, and took the risk of having his security increased by future subscriptions under the law as it then existed ; but it was no part of the obligation of his contract, that future stock should be taken under that law. His state, in reference to that, was wholly passive.

IV.

The defendant's subscription of stock was a contract.

Angel & Ames on Corp., § 517, 519.

The subscriber, then, also becomes entitled to the protection of the law, and the law fixing the liability of the subscriber as it exists at the date of his subscription, enters into and forms a part of *his* contract.

Ireland *vs.* Palestine Turnpike Company, 19 Ohio State R., 369.

McCrag *vs.* Junction R. R., 10 Ind., 359.

When the defendant subscribed for its stock, the law imposed no double liability upon it, and it was not bound to look further than the law to ascertain its liability.

As stated by Marshall, C. J., in Sturgis *vs.* Crowenshield (4 Wheat., 122), and cited and approved by Thompson, J., in Ogden *vs.* Saunders, 12 Wheat., 302.

" That is as I understand it, *the law of the contract forms its obligation ;* and if so, the contract is fulfilled, *and its obligation discharged by complying with whatever the existing law required in relation to such contract.*"

The defendant's contract with the corporation then, was that it would pay one hundred dollars for each share of stock purchased by it of the company, and that one hundred dollars per share, is the measure of its liability, and when it pays that, then "the contract is fulfilled, and its obligation is discharged by complying with what the *existing law required in relation to such contract.*"

There was nothing implied, that bound the defendant to comply with the provisions of any former law.

V.

In reference to the fifth subdivision of plaintiff's argument, which is an appeal to the Court to save him from loss, we say it nowhere appears that the plaintiff has exhausted his remedy as conferred by statute, before he endeavors to go upon the defendant.

Where are the stockholders who owned stock at the date of his contract, or who became such before the law of liability was altered?

Are they, as well as the company, insolvent? It does not so appear. If it did, we would then answer that with ten-fold force, the appeal comes to this Court to uphold and sustain the defendant's contract as it exists by the law under which he contracted.

The plaintiff trusts a mere shadow without any financial ability to pay, existing either in the corporation or its members, and trusts (as he says) to the future acquisition, of the company, and to its future sale of stock whereby men of means will become stockholders, and to whom he may look for the payment of his debt.

While the double liability remains in force, men of means, of financial ability, will not put their money

into this sink-hole, not only to see the amount of their stock swallowed up, but to afterward become liable for a like amount in the payment of debts, for which they receive no benefit. So to induce them to subscribe, the State, by solemn constitutional amendment, repeals the personal liability, and then says to the defendants, "now invest and you will only be liable for your stock."

Trusting to this promise the defendant invests and, at once the plaintiff passing over all prior stockholders, to whom he gave credit, and with whom he contracted, pounces down upon the defendant and says, "now my worthless debt is made good," and when the defendant claims protection under the law of *his* contract, he is told that as to prior debts it is void; that the "plaintiff's contract is first in order of time."

This is a practical application of the fable of the "Spider and the Fly."

The plaintiff assumes that the defendant is liable under the law as if unrepealed, for all debts contracted prior to the repeal, and that the defendant knew at the time of its subscription, that such would be the operation of the law as applied to his liability, and acted with full knowledge of such liability.

It is a violent presumption. This question is one of the most intricate of all constitutional questions. So intricate in fact, as to lead the Supreme Court of Missouri into error (if the plaintiff's construction of it is correct) so intricate, as to involve the various courts in such a labyrinth of contradictions, that Judge Wright, one of the ablest jurists in the West, almost gives up in despair at the effort to reconcile this conflict, and yet, we are told that this defendant fully understood when he contracted that he was to assume such liability and

that the law which made him a different offer was unconstitutional.

We say it did not so understand the law.

We say further that the law, as in force at the time of his subscription should be given full effect.

We claim that at least the unconstitutionality of the law is doubtful, and if doubtful it must be upheld Such is the doctrine of this Court.

In Fletcher *vs.* Peck (6 Cranch, 128), the court uses this language: "The question whether a law is void for its repugnancy to the Constitution, is at all times a question of much delicacy, which ought seldom, or ever, to be decided in the affirmative in a doubtful case."

This is quoted and approved by Thompson, J., in Ogden *vs.* Saunders, at page 294, and he there adds: "If such is to be the rule by which the examination of this case is to be governed and tried (and that it is, no one can doubt), I am certainly not prepared to say that it is not, at least, a doubtful case, or that I feel a clear conviction that the law in question is incompatible with the Constitution of the United States.

And Mr. Justice Washington, in same case, at page 270, says: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond a doubt."

The plaintiff places his greatest reliance upon the following provision of the statute:

"The Legislature may at any time alter or amend this chapter, but such alteration or amendment shall not * * * take away or impair any remedy given against such corporation, its stockholders, or officers, for any

liability which shall have been previously incurred." —Wag. Stat., 312.

We think we have shown that the amendment does not have that effect.

" It shall not alter or impair any remedy given."

This must be a remedy actually in existence at the date of the amendment to come within the statute, and cannot apply to a remedy that is only in expectancy or one that may by some possibility thereafter arise.

It shall release no security in existence; but can it be said that the law must forever leave open the way for acquiring greater security?

We have thus reasoned to our conclusion, (as we think both upon principle and authority), that the amendment as construed by the Supreme Court of Missouri is not violative of the provisions of the Constitution of the United States; and we have only this to say in conclusion, that as we have seen the settled rule of this Court is to uphold the constitutionality of a State law, where it is not *clearly* violative of the National Constitution in any case, we therefore say that in a case like the present, the Court should only when the violation is palpable, declare the law void.

This defendant was not certainly a party to the original contract with plaintiff. There is no direct privity between the plaintiff and defendant. The defendant had no voice in making the contract, and before it became a member of the company, the State, through the forms of a constitutional amendment, had said to it, that in becoming a member of this corporation, it assumed no liability further than the payment of the price of its stock.

It cannot surely be said that the defendant assumed knowingly the liability. It cannot be that it volunta-

rily assumed to pay any part of plaintiff's debt further than the payment of its stock, and if it is now to be made liable thereon, then the law instead of being a protection, becomes a trap—a pit-fall in the pathway of enterprise, and will have the effect of destroying that confidence in the protection of law which is essential to the public welfare.

F. T. HUGHES, and
A. J. BAKER,
Atty's for Defendant in Error.
With whom is
T. T. GANT.

SUPPLEMENTAL BRIEF.

The attention of the Court is called to the last article in the agreed statement of facts.

That the original stock of the Alexandria and Nebraska City Railroad Company, being the company with which plaintiff's contract was made, was two millions of dollars, and that upon the consolidation this was increased to thirteen millions.

To what then did the plaintiff give credit? To the corporation, and to the two millions of stock, not to thirteen millions.

There is nothing in the case to contradict the presumption, that prior to the consolidation, the entire stock of the A. &. N. C. R. R. Co. had been taken, and that therefore all the stock to which the plaintiff trusted was absorbed.

But the plaintiff's counsel claims that at the date of the consolidation there was a new contract between the plaintiff and the consolidated company.

We say that this is not so. There was a contract between the consolidated corporation, and the constituent, the A. & N. C. R. R. Co., that the consolidated company should pay the debts of the constituent. but plaintiff was not a party to this contract He cannot date his obligation from that time. He trusted the A. & N. C. R. R. Co. and its two millions of capital and not the M., I. & N. and its thirteen millions. Admit however, that there was a new contract at the time between the plaintiff and the M., I. & N. R. R. Co., and it will not alter the case.

The Missouri, Iowa & Nebraska Railroad with all the stockholders in existence at the date of consolidation becomes pledged for the payment of the debt. That is the entire property of that corporation and the two millions of stock of the old corporation, the Alexandria and Nebraska City Railroad Co., and the one and a half millions of stock of the Iowa Southern Railroad.

The plaintiff's remedy is not then impaired, it is much enlarged, and his security is much greater than it was at the date of contract.

Now the company proposes under the amended liability law, to sell yet another nine and a half millions of stock. Can the plaintiff then claim that his *remedy* under the law as it existed at the date of his contract, is *impaired* because of this increase and sale of increased stock?

To impair, means to lessen, or to depreciate in value; to impair a contract is to take away some remedy existing, or to add some burden which will make the remedy more difficult, or the security less valuable.

Do any of these results follow the sale of this additional stock under the amended liability law? Certainly not. There is not a farthing of security taken from the plaintiff. He has the corporation, with all its franchises and assets of every kind, the same as when he contracted; he has the holders of the same two millions of stock or their assignees; he has an additional security in the franchises and assets of the Iowa Southern Railway Company, and the liability of the holders of one and a half millions of stock in that, superadded to what security he had when his contract was made, and then, he has the price of the additional stock that is sold after the increase. All this is added

to his remedies under his contract, and he now complains because he is not allowed to increase that security, to the amount of another nine and a half millions of dollars.

The object of the framers of the constitution in prohibiting States from passing laws impairing the obligation of contracts, was to give confidence to credit, and was founded in much forethought and wisdom. But we cannot conceive that it was their design to tie up legislation in the manner contended for in this case. It is an attempt to extend the principle beyond the bounds of all reason.